APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1965

No. 870

FRED BANKS,

Petitioner,

—vs—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1966

CERTIORARI GRANTED OCTOBER 3, 1966



Supreme Court of the United States

OCTOBER TERM, 1968

No. 670

FRED BANKS,

Petitioner,

—VS.—

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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J. F. COAKLEY
District Attorney
Court House
1225 Fallon Street
Oakland 12, California
HIghgate 4-0507

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

No. 33698

THE PEOPLE OF THE STATE OF CALIFORNIA

-*vs*-

FRED BANKS (True Name)
DEFENDANT

INFORMATION

The District Attorney of the County of Alameda hereby accuses Fred Banks of a felony, to wit, Attempted Robbery in that on or about the 4th day of May, 1962, in the County of Alameda, State of California, he attempted to rob ROGER WONG of lawful money of the United States.

SECOND COUNT

And the said Fred Banks, is further accused by the District Attorney of the County of Alameda, by this second count of this Information, of a felony, to wit: Robbery, a violation of Section 211 of the Penal Code of the State of California, in that on or about the 4th day of May, 1962, in the County of Alameda, State of California, he robbed ROBERT PERRY of Seventy Dollars ($70), more or less, lawful money of the United States.

THIRD COUNT

And the said Fred Banks, is further accused by the District Attorney of the County of Alameda, by this third count of this Information, of a felony, to wit: Robbery, a violation of Section 211 of the Penal Code of the State of California, in that on or about the 4th day of May, 1962, in the County of Alameda, State of California, he robbed WILLIAM PAULETICH of One Hundred Seventy-Five Dollars ($175), more or less, lawful money of the United States.

FIRST PRIOR CONVICTION

The District Attorney of the County of Alameda further charges that before the commission of the offenses charged in this Information and on or about the 20th day of July, 1936, the said Fred Banks, under the name of Fred Banks, was convicted in the Circuit Court of the State of Illinois in and for the County of Cook, of a felony, to wit: Murder, and that in pursuance of said conviction the said EXCELL EDWARD DENHAM served a term in the State Prison at Joliet, Illinois, a penal institution.

SECOND PRIOR CONVICTION

The District Attorney of the County of Alameda further charges that before the commission of the offenses charged in this Information, and on or about the 20th day of July, 1936, the said Fred Banks, under the name of Fred Banks, was convicted in the Circuit Court of the State of Illinois in and for the County of Cook, of a felony, to wit: Robbery, and that in pursuance of said conviction the said EXCELL EDWARD DENHAM served a term in the State Prison at Joliet, Illinois, a penal institution.

THIRD PRIOR CONVICTION

The District Attorney of the County of Alameda further charges that before the commission of the offenses charged in this Information, and on or about the 20th day of July, 1936, the said Fred Banks, under the name of Fred Banks, was convicted in the Circuit Court of the

State of Illinois in and for the County of Cook, of a felony, to wit: Armed Robbery, and that in pursuance of said conviction the said EXCELL EDWARD DENHAM served a term in the State Prison at Joliet, Illinois, a penal institution.

J. F. COAKLEY
District Attorney of the County of Alameda, State of California

By /s/ Jerry G. Murphy
Deputy District Attorney of the County of Alameda, State of California

Received on Microfilm AUG 7 1962

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DEPT. 5

Date: Aug. 3, 1962 Hon. Thomas W. Caldecott, Judge — Roger McCluney, Deputy Clerk
Duane Harris, Deputy Sheriff — Edgar F. Jones, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff — Counsel appearing for Plaintiff: Jerry G. Murphy, Deputy Dist. Atty.

vs.

FRED BANKS, Defendant — Counsel appearing for Defendant: Defendant in propria persona

NATURE OF PROCEEDINGS: Further Jury Trial — ACTION No. 33698

Trial resumed at 10:27 a.m. this day, it having been recessed from August 2, 1962. Out of the presence of the jury, all parties to the trial, including defendant's advisor Asst. Public Defender Stephen W. Shaughnessy, are in chambers with the Court and attaches. Defendant confers with the Court in re: the appearance of certain of his witnesses, and arrangements are made for their subpoenas. Defendant moves for the production of an expert witness in his behalf in re: identification process. Said motion for the production of an expert witness is by the Court denied. At 10:37 a.m. all parties to the trial, including defendant's advisor Stephen W. Shaughnessy, are in the courtroom with the Court. The jury is all present, and the trial is resumed. William Pauletich resumes the stand for further cross-examination by the defendant. Sam Slaise and Coatsie Smith, Jr., are sworn and examined for the People and cross-examined by the defendant in the order herein named. At 11:25 a.m. the jury is admonished and a recess declared, the Court reconvening at 11:50 a.m. with the jury and all parties present, including defendant's advisor Stephen W. Shaughnessy. The jury is admonished and excused until 10:00 a.m. on August 6, 1962. Out of the presence of the jury, the defendant renews his motion for the production of an expert witness in his behalf in re: the identification process. Said motion for the production of such an expert witness is again denied. At 11:55 a.m. the instant trial is by the Court recessed until Monday, August 6, 1962, at 10:00 a.m.

(Last People's Exhibit 26; last Defendant's: B)

BANKS, Fred 62-4272 Action # 33698

Received of Bailiff D.P. Harris one book "California Jury Instructions - Criminal." Requested by me at 10:00 AM 8-3-62 and delivered at about 11:32 AM. same date.

Fred Banks
FRED BANKS

FILED
AUG 3 - 1962
JACK G. BLUE, County Clerk
By Roger McCluney DEPUTY

Recorded on Microfilm AUG 14 1962

#31

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DEPT. 5

Date: Aug. 6, 1962 Hon. Thomas W. Caldecott, Judge; Roger McCluney, Deputy Clerk
Duane Harris, Deputy Sheriff; Edgar F. Jones, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff — Counsel appearing for Plaintiff: Jerry C. Murphy, Deputy Dist. Atty.

vs.

FRED BANKS, Defendant — Counsel appearing for Defendant: Defendant in propria persona

NATURE OF PROCEEDINGS: Further Jury Trial. ACTION No. 33698

Trial resumes in the instant cause at 11:34 a.m. this day, it having been recessed from August 3, 1962. The defendant and his advisor, Ass't. Public Defender Stephen W. Shaughnessy, and the district attorney are in chambers with the Court and attaches out of the presence of the jury. Defendant moves to strike the testimony of the last two prosecuting witnesses from the record, to wit, that of Sam Slaise and Coatsie Smith, Jr. Said defendant's motion to strike is by the Court denied. At 11:37 a.m. all parties are present in the courtroom including defendant's advisor Stephen W. Shaughnessy. The jury is all present, and the trial resumes. Harry D. Neilsen of the Oakland Police Department is sworn and examined for the People.
PEOPLE'S EXHIBIT 27 (Oakland Police Department Property Record of Fred Banks) is marked FOR IDENTIFICATION. Cross-examination at 11:50 a.m. At 12:05 p.m. the jury is admonished and a recess declared, the Court reconvening at 1:42 p.m. with the jury and all parties present including defendant's advisor Stephen W. Shaughnessy.
PEOPLE'S EXHIBIT 28 (Diagram of Streets of City of Oakland) is admitted IN EVIDENCE as to names and sequence of streets. PEOPLE'S EXHIBITS 20, 21 and 22, heretofore marked for identification, are now admitted IN EVIDENCE. At 1:45 p.m. the People rest. The defendant makes his opening statement to the jury. At 1:47 p.m. Princess Nance is sworn and examined for defendant. DEFENDANT'S EXHIBIT C (Bill of Fred Banks for plumbing with 9 bills for materials attached) is marked FOR IDENTIFICATION. At 1:55 p.m. Sarah Cunningham, Joe Pollard, Thelma O'Hara and Richard Ticksman are sworn and examined for defendant in the order herein named. At 2:27 p.m. the jury is admonished and a recess declared. At 2:46 p.m. the defendant is in chambers with his advisor, Stephen W. Shaughnessy, and the district attorney with the Court and attaches. It appearing that Officer Ayer is not available for subpoena, a suggested stipulation is propounded as to his testimony if he were called as a witness. At 3:00 p.m. all parties are in the courtroom including defendant's advisor Stephen W. Shaughnessy. The jury is all present, and the trial resumes. It is substantially stipulated that if Officer Ayer were called as a witness he would testify that he was one of the investigating officers of the 3-Point Liquors incident, that he interviewed the reporting party who stated that the suspect got a little more than seventy to eighty dollars, and it is further stipulated that the report was not signed by the reporting party. Before defendant rested and outside the presence of the jury, the Court explained to defendant that he had a right to testify in his own behalf if he desired to do so and that if he failed to testify, the Court had a duty in it's instructions to comment to the jury of the failure of defendant to so testify. The defendant elected not to testify. At 3:03 p.m. both sides rest. The People's opening argument is made by Deputy District Attorney Jerry C. Murphy. At 3:25 p.m. the jury is admonished and excused until 10:00 a.m. on August 7, 1962. Out of the presence of the jury, defendant moves for a directed verdict as to each of the three counts on the ground that the State failed to prove its case. Said defendant's motion for a directed verdict as to each of the three counts is by the Court denied. At 3:30 p.m. the instant trial is by the Court recessed until 10:00 a.m. on August 7, 1962.

(Last People's Exhibit: 28; last Defendant's: C)

Received on Microfilm AUG 24 1962 32

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DEPT. 5

Date: August 7, 1962 Hon. Thomas W. Caldecott, Judge; Duane Harris, Deputy Sheriff; Roger McCluney - Edgar F. Jones, Deputy Clerk, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff — Counsel appearing for Plaintiff: Jerry G. Murphy, Deputy Dist. Atty.

vs.

FRED BANKS, Defendant — Counsel appearing for Defendant: Defendant in propria persona

NATURE OF PROCEEDINGS: Further jury trial. ACTION No. 33698

Trial resumed in the instant cause at 10:02 a.m. this day, it having been recessed from August 6, 1962. The jury is all present. Defendant and his advisor, Asst. Public Defender Stephen W. Shaughnessy, are present. Defendant makes his argument to the jury. At 11:05 a.m. the People's closing argument is made by Deputy District Attorney Jerry G. Murphy. At 11:26 a.m. the Court instructs the jury as to the law applicable herein. At 11:50 a.m. the jury retires to deliberate in charge of sworn officer Duane Harris. It is stipulated that the exhibits in evidence may be taken to the jury room if requested by the jury and that the jury may be taken to lunch without further courtroom appearance of defendant or counsel. At 12:03 p.m. the jury is taken to lunch in charge of sworn officers Duane Harris and Harold Atthowe, returning therefrom at 1:33 pm for further deliberations. At 2:59 p.m. the jury is all present in the courtroom in the presence of all parties including the defendant and his advisor Stephen W. Shaughnessy. The jury asks the Court a question in re: elements of first degree robbery, and the Court answers said question. At 3:00 pm. the jury retires for further deliberations. At 3:15 p.m. the jury returns to the courtroom in the presence of all parties including the defendant and his advisor, Stephen W. Shaughnessy. The jury renders the following verdicts which are read by the clerk and each of the three verdicts affirmed by the jury as read (omitting title of Court and cause):

VERDICT OF JURY

We, the jury in the above entitled cause, find the defendant Fred Banks guilty of felony, to wit, Attempted Robbery, as charged in the first count of the information, and we further find that the Attempted Robbery is of the second degree.

/s/ Richard W. Saunders, Foreman

VERDICT OF JURY

We, the jury in the above entitled cause, find the defendant Fred Banks guilty of felony, to wit, Robbery, a violation of Section 211 of the Penal Code of the State of California, as charged in the second count of the information, and we further find that the Robbery is of the second degree.

/s/ Richard W. Saunders, Foreman

VERDICT OF JURY

We, the jury in the above entitled cause, find the defendant Fred Banks guilty of felony, to wit, Robbery, a violation of Section 211 of the Penal Code of the State of California, as charged in the third count of the information, and we further find that the Robbery is of the second degree.

/s/ Richard W. Saunders, Foreman

At the request of defendant, the jury is polled as to each of the said three counts, and each of the three verdicts is unanimous. Each of the three verdicts is recorded. The jury is discharged from the instant cause to report for further jury service on August 14, 1962, at 9:45 a.m. At the request of the defendant, the cause is by the Court ordered and hereby is continued to August 9, 1962, at 9:15 a.m. for sentence. Adjournment at 3:23 p.m.

8

7

You are the exclusive judges of the facts and of the weight and [illegible] evidence, but you must determine the [illegible] in the evidence produced herein. Must [illegible] evidence was admitted and afterwards was ruled by me to be stricken out, you must disregard entirely the matter thus stricken, and if any counsel [illegible] in any of his questions that certain [illegible] facts were, or were not true, you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel during the trial in reference concerning the facts in the case, you will not regard such a statement as evidence, unless, however, that it counsel for both parties have stipulated to any fact, you are to regard that fact as being conclusively proved, and if in the trial either party has admitted a fact to be true, such admission may be considered by you as evidence in the case.

Criminal law 768(1), 783½

DISTRICT COURT
AUG 7 - 1962
ROGER McCLUNEY
DEPUTY

Defendant's Proposed Instructions

Covered

FILED
AUG 7 - 1962
JACK C. BLUE, County Clerk
By Virginia Cluney
DEPUTY

Sect 4 Page 30-31

The attitude and conduct of jurors at the end of the deliberation are also considered in practice. It is only proper & good for a juror, upon entering the jury room to make an emphatic expression of his opinion on the case & to announce a determination to stand for a certain verdict when one does not at the outset, but several ballots may be aroused, and he may resolutely recede from an announced position & be convinced that it is fallacious. Remember that you are not partisan or advocates, but rather judges. The final test of the quality of your decision will be the verdict which you return to the court not in the opinion of any one man, but as you each have considered the case with the desire to arrive at a just & proper verdict in the case. To that end the court reminds you that in your deliberations in the jury room the search for truth & the ascertainment and declaration of the truth.

Criminal Law ~ 768 [1-3]

covered T.W.C.

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inference for or against either party because of such evidence is admissible is purely a question of law. In admitting evidence to which an objection is made the court does not determine that weight should be given such evidence, nor does it pass on the credibility of the witness. [As to any piece of evidence that has been received by the court you will disregard the same as to any question to which an objection was sustained. You must not conjecture as to what the answer might have been as to the reasons for the objection.]

Criminal law ~768(1)

Covered T.W.C.

Sect 27 page 46

I instruct you further that you are not permitted, on circumstantial evidence alone, to convict the case of the people's substantially on circumstantial evidence to find the defendant guilty of the [any] crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion.

Criminal law 784(7)

refused TWC

Sect 28 page 47

When the case which has been made out by the people against a defendant rests entirely or chiefly on circumstantial evidence, and the guilt of the defendant is sought to be established by such evidence, each fact which is essential to complete a chain of circumstances from which will establish the defendant's guilt must be proved beyond a reasonable doubt.

Criminal Law - 784(5)

refused TWC

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, unlike the facts testify acts essential in his own defense. Hence any inference or facts against him which the law may draw because of facts within the knowledge of defendant testify or if, though he did testify, he fails to explain such evidence, the jury may say that such evidence and circumstances tending to indicate the fact of such evidence and as indicating that a more inference that may be reasonably drawn therefrom unfavorable to the defendant are the more probable. The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or in itself warrant an inference of guilt nor does it relieve the prosecution of the burden of proving every essential element of the crime and of the guilt of the defendant beyond a reasonable doubt.

covered T.W.C.

End count of each indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only one before you for consideration, and you must state your findings as to each count in a separate verdict, uninfluenced by the verdict as to any other count. The fact that a verdict as to any one count is against a defendant, or in favor of a defendant, should not control your verdict as to any other count, but you must consider each count separately upon

the evidence and the weight that
give to it under the court's instructions.

Criminal law 768(1), 771(2), 772
other specific topics

covered T.W.C.

Aug. 9 Motion for a new Trial 1962

Sec. 1181 Penal Code.

FILED
AUG 9 - 1962
JACK G. BLUE County Clerk
By [illegible] Deputy

Ground of a New Trial

1). Defendant Denied of Counsel at trial when the Public Defender in violation of Sec. 1, 14th Amendment, United States Constitution.

2). Defendant was Denied a fair and impartial trial in violation of Sec. 1, 14th Amendment, United Constitution,

3). Defendant was denied a fair and impartial trial because jurors were prejudice, from setting on other trials before servicing at his trial, in violation of Sec. 1, 14th Amendment United States Constitution

4.) Defendant was denied a fair and impartial trial when he was forced to trial on three Different offenses, in violation of Sec. 1, 14th Amendment, United States Constitution.

5.) Defendant was denied a fair and impartial trial when jury tried him of three different offenses, in violation of Sec. 1, 14th Amendment, United Constitution

(Defendant was tried of three different offenses at one and the same trial)

Cause 90 — Ground for new Trial — year 1963

6) Defendant was denied a fair and impartial trial when the Judge failed to rule if the similar offenses, Sec. 954 of the California Penal Code is Cruel and Unusual. The Defendant asks this Court to rule on the constitutionality of the aforesaid law before he is brought to trial. This Court fail to do so by its failure it denied the Defendant of a fair trial in violation of Sec. 1, 14th Amendment, United States Constitution.

7) The District Attorney has been guilty of prejudicial misconduct during the trial when before a jury, in violation of Sec. 1, 14th Amendment, United States Constitution.

8) The District Attorney has been guilty of prejudicial misconduct during the Closing Argument time before the jury in violation Sec. 1, 14th Amendment, United States Constitution.

9) The Defendant was denied a fair and impartial trial by the District Attorney prejudicial misconduct during opening statement before the jury in violation Sec. 1, 14th Amendment, United States Constitution.

10) The Defendant was denied a fair and impartial trial by the District Attorney when prejudicial statements before a jury in

Aug. 90 Year 1962

Violation Sec. 1, 14th Amendment, United States Constitution.

12) The Defendant was denied a fair and impartial trial by misconduct of the trial judge, in violation Sec. 1, 14th Amendment, United States Constitution.

13) The Defendant was denied a fair and impartial trial when the Court misdirected the jury in a matter of law, in violation Sec. 1, 14th Amendment, United States Constitution.

13.) The Defendant was denied a fair and impartial trial by the trial court's instruction to the jury on admission, when there was no evidence, in violation Sec. 1, 14th Amendment, United States Constitution.

14.) The Defendant was denied a fair and impartial, by the trial court's instruction to the jury on similar crime when there was no evidence of similar crimes, in violation Sec. 1, 14th Amendment, United States Constitution.

15.) The Defendant was denied a fair and impartial trial by the trial court's instruction to the jury on Intent, when there was no evidence to support it, in violation Sec. 1, 14th Amendment, United States Constitution.

Continued next

Aug. 9 Oct 1962

16) Defendant was denied a fair and impartial trial as his trial counsel did not object or request a continuance so he could call witnesses in support of his motion to suppress evidence in violation Sec. 1, 14th Amendment United States Constitution.

17) Defendant was denied a fair and impartial trial as his trial counsel failed to object to prosecutorial misconduct in violation Sec. 1, 14th. Amendment United States Constitution.
(Except witness called by Defendant as the court is called below)

18. Defendant was denied a fair and impartial trial when his trial counsel failed to file a motion to suppress the trial held last June 1962 in violation of the failure to protect the Defendant Constitutional rights, see United States Sec. 1, 14th. Amendment, United States Constitution.

19. Defendant was denied a fair and impartial trial as his trial counsel failed to protect the Defendant Constitutional rights. Please see exhibit "A" in violation Sec. 1, 14th. Amendment, United States Constitution.

20) Defendant was denied a fair and impartial trial as his trial counsel failed to file any pre-trial challenges, see violation Sec. 1, 14th. Amendment, United States Constitution.

SUPERIOR COURT OF THE STATE OF CALIFORNIA DEPT. 5
IN AND FOR THE COUNTY OF ALAMEDA

Date: Aug. 9, 1962 Hon. Thomas W. Caldecott, Judge; Roger McCluney, Deputy Clerk
Duane Harris, Deputy Sheriff; Edgar F. Jones, Reporter

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff — Counsel appearing for Plaintiff: John S. Mead, Deputy Dist. Atty.

vs.

FRED BANKS, Defendant — Counsel appearing for Defendant: Defendant in propria persona

Probation Officer appearing: - - -

NATURE OF PROCEEDINGS: Sentence to State Prison. ACTION No. 33698

Defendant is present. Defendant moves for an order granting a new trial under the provisions of Section 1181, Penal Code, gives grounds, argues thereon, and the motion is submitted. The Court orders that defendant's motion for a new trial be and the same is hereby denied on each and all grounds. Defendant, having reduced his motion for a new trial to writing, the Court orders that the document be and it is filed.

The defendant having been convicted on August 7, 1962 by
( ) plea of guilty
( ) decision of Court
(X) verdict of jury
of the offense s of felony, to wit, Attempted Robbery, as charged in the first count of the information and fixed by the jury at Attempted Robbery of the second degree, and of felonies, to wit, Robbery, a violation of Section 211 of the California Penal Code, as charged in the second and third counts of the information, and each of the said second and third counts having been fixed by the jury at Robbery of the second degree, and with prior felony convictions charged and admitted as follows:

Date	County and State	Crime	Disposition
-20-36	Cook, Illinois	Murder	State Prison, Joliet, Ill.
-20-36	Cook, Illinois	Robbery	State Prison, Joliet, Ill.
-20-36	Cook, Illinois	Armed Robbery	State Prison, Joliet, Ill.

The defendant is arraigned for sentence and has no further legal cause to show why the judgment of this Court should not be pronounced against him. The Court pronounces judgment.

It is ORDERED that said defendant be punished by imprisonment in state prison of the State of California for the term provided by law.

It is further ORDERED that sentences shall be served in respect to one another as follows:

That the terms of imprisonment imposed on the first, second and third counts of the information shall run concurrently, each with the others.

and in respect to any prior incompleted sentence(s) as follows:

- - - -

It is further ORDERED that the defendant is remanded to the custody of the Sheriff of the County of Alameda to be by him delivered to the Director of Corrections of the State of California at California Medical Facility, Vacaville, California.

ABSTRACT OF JUDGMENT
(Commitment to State Prison)

The People of the State of California, Present:

vs.

FRED BAINES
Defendant

Present:
Hon. Thomas W. Caldecott
Judge of the Superior Court
John S. Mead
Deputy District Attorney
Defendant in propria personae
Counsel for Defendant

This certifies that on August 7, 1962 judgment of conviction of the above-named defendant was entered as follows:

(1) Case No. 33698 Count No. 0, 1, 2 and 3

On his plea of not guilty he was convicted by verdicts of jury of felony, to wit, Attempted Robbery, as charged in the first count of the information and fixed by the jury at Attempted Robbery of the second degree; and of felonies, to wit, Robbery, a violation of Section 211 of the California Penal Code, as charged in the second and third counts of the information, and each of the said second and third counts having been fixed by the jury at Robbery of the second degree. Defendant's motion for a new trial was denied.

with prior felony convictions charged and proved or admitted as follows:

Date	County and State	Crime	Disposition
7-20-36	Cook, Illinois	Murder	State Prison, Joliet, Ill.
7-20-36	Cook, Illinois	Robbery	State Prison, Joliet, Ill.
7-20-36	Cook, Illinois	Armed Robbery	State Prison, Joliet, Ill.

Defendant charged with and proved or admitted being armed with a deadly weapon at the time of his commission of the offense or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Section 3024.

(2) Defendant XXXX adjudged an habitual criminal within the meaning of Subdivision XXXX of Section 644 of the Penal Code, and the Defendant XXXX habitual criminal in accordance with provisions of Subdivision (c) of that section XXXX XXXX

(3) IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in state prison of the State of California for the term provided by law and that he be remanded to the Sheriff of the County of Alameda, and by him delivered to the Director of Corrections of the State of California at California Medical Facility, Vacaville, California

It is ordered that sentences shall be served in respect to one another as follows:

That the terms of imprisonment imposed on the first, second and third counts of the information shall run concurrently, each with the others.

and in respect to any prior incompleted sentence(s) as follows:

FILED
AUG 9 - 1962
JACK G. BLUE, County Clerk
By Roger M. Cleary DEPUTY

(4) To the Sheriff of the County of Alameda and to the Director of Corrections at the California Medical Facility, Vacaville, California

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above named defendant into the custody of the Director of Corrections at the California Medical Facility, Vacaville, California, at your earliest convenience.

Witness my hand and seal of said court this 9th day of August, 1962

JACK G. BLUE, Clerk

(SEAL)

By ....., Deputy

State of California, County of Alameda, } ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this

(SEAL)

9th day of August, 1962

JACK G. BLUE,
County Clerk and ex officio Clerk of the Superior Court of the State of California in and for the County of Alameda.

[Filed 1962 Aug 9 PM 3:48, Jack G. Blue, County Clerk
By (Illegible), Deputy]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

No. 33698

Dept. No. 5

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

FRED BANKS, DEFENDANT

NOTICE OF APPEAL FROM JUDGMENT

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

Please take notice that FRED BANKS, the defendant in the above-entitled action, hereby appeals to the District Court of Appeal of the State of California in and for the First Appellate District, from the judgment herein entered in the above-entitled Court on the 9th day of August, 1962.

DATED: This 9th day of August, 1962.

/s/ Fred Banks
FRED BANKS, Defendant
in propria persona

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BEFORE HONORABLE THOMAS W. CALDECOTT, JUDGE
DEPARTMENT NO. 5

No. 33698

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

vs.

FRED BANKS, DEFENDANT

REPORTER'S TRANSCRIPT—
June 7, 1962-August 7, 1962

COURTHOUSE, OAKLAND, CALIFORNIA

APPEARANCES

For the People:

JERRY G. MURPHY, Esquire, Deputy District Attorney of the County of Alameda, State of California.

For the Defendant:

FRED BANKS, in propria persona.

[fol. 29]

WEDNESDAY, JULY 25, 1962 10:00 O'CLOCK A.M.

BEFORE: HONORABLE WILLIAM J. MCGUINNESS, JUDGE

For the People: ROBERT H. MCCREARY, Assistant District Attorney
JOHN MEAD, Deputy District Attorney

For the Defendant: In pro per

Present: STEPHEN W. SHAUGHNESSY, Public Defender

CONFERENCE IN CHAMBERS

* * * *

[fol. 47] THE DEFENDANT: Well, I still insist on defending myself. I would rather the case go that way than go on the services of counsel. This way, the case itself as it stands now, and when it gets before a higher court if I am convicted, which I don't deny, I don't believe because of the higher percentage of the State's Attorney of Alameda have; of course, it is possible. In case I do get convicted, it will go on appeal.

THE COURT: You understand, of course, you would still have the right of appeal whether you are represented by an attorney or not?

THE DEFENDANT: I understand.

THE COURT: Your rights are accorded to you, you understand that?

THE DEFENDANT: I understand. It looks much better going up without counsel.

THE COURT: In what way does it look better to you?

THE DEFENDANT: Because I do say that within California law there is another way you could appoint counsel other than the Public Defender's office. I do believe that. I haven't run across it in the books, but I think there is a couple of books I still haven't seen on this particular point.

* * * *

[fol. 52]

MONDAY, JULY 30, 1962 11:12 O'CLOCK A.M.

BEFORE: HONORABLE THOMAS W. CALDECOTT, JUDGE

For the People: JERRY G. MURPHY, Deputy District Attorney

For the Defendant: In Pro Per

Present: STEPHEN W. SHAUGHNESSY, Assistant Public Defender

PROCEEDINGS IN CHAMBERS BEFORE THE SELECTION OF THE JURY
11:12 O'CLOCK A.M.

* * * *

[fol. 56] THE DEFENDANT: Yes, but there are several other things.

Now, this trial is going now, and I made a motion up earlier in the Court about some three weeks ago about consulting with expert witnesses concerning the amount of identification.

See, the only thing in the case that involved me with [fol. 57] this case is identification.

THE COURT: Yes. I am not familiar with the case at all, but that is usually a major—

I assume you were not arrested at the time of the robbery on the premises?

THE DEFENDANT: No, and I wanted to consult expert witnesses so I could determine whether there was a valid ground which also, I believe, appeared in the identification.

I think I made a motion to that effect some three weeks ago.

THE COURT: This is someone who was there?

THE DEFENDANT: No, an expert witness.

See, I think the petitioner is entitled to also consult experts concerning people identifying different people through mistake, and they have a reason for it.

I think that people have stated that field for mistaken identity. I think they have expert witnesses, people who are experts and authorities in that field who will deal with the mind, like psychoanalysis, to tell why people identify other people after giving psychoanalysis testing.

I believe that also involves identification which I made a motion several weeks ago concerning.

THE COURT: At this time I don't think it is material.

If it gets to some other point that the evidence brings out, it would be, in which case we will recess and go into it.

But if it is just the matter of people testifying as to [fol. 58] what they saw or heard, or something of that type, I don't see where any of that would be necessary.

THE DEFENDANT: No, this isn't testimony to something that they had seen or heard, this is testimony to a known theory, I forget what they call it now, but it is in identification.

It involves identification. Just like if you walk down the street, you see somebody that you think that you know which you don't know, which I am quite sure it has happened to you as well as anybody else.

But, yet, still under expert analysis, they tell the reason why that happens to you.

I don't know whether you are familiar with that particular term or not.

THE COURT: Well, if it develops in the course of the trial that such would be an issue, then we can go into it at that time. I don't see at this time that it would be.

* * * *

[fol. 60] PROCEEDINGS IN OPEN COURT
11:20 A.M.

* * * *

[65] THE COURT: All right, every defendant who comes before the Court in a criminal proceedings is entitled to a presumption of innocence which is granted to him under our Constitution.

Can you and will you give this defendant the benefit of this presumption.

I assume from the nodding of your heads you will.

In order to convict in a criminal case, such as the one now being tried, it is necessary for the prosecution to produce evidence that convinces you beyond a reasonable doubt and to a moral certainty of the truth of the charges brought against the defendant.

If the prosecution does produce such evidence and does so convince you, it will be your duty to convict.

If the prosecution fails to produce such evidence or fails to so convince you, it would be your duty to acquit.

Can you and will you use this standard in deciding the question of guilt or innocence in this case?

MEMBERS OF THE JURY: Yes.

THE COURT: Good. It is the duty of the Court to instruct you as to the law governing your deliberations in this case, and it is your duty to accept that law and to use it in your deliberations toward a verdict.

Can you and will you accept the law as I state it to be and apply that law in your deliberations toward a verdict?

MEMBERS OF THE JURY: Yes.

[fol. 66] THE COURT: Do each of you feel you can be completely fair and impartial both to the prosecution and to the defendant in this case?

MEMBERS OF THE JURY: Yes.

* * * *

[fol. 172] PROCEEDINGS IN OPEN COURT
11:30 A.M.

THE COURT: We have been getting some matters straightened out before we brought you down.

Stipulated the jury is all present.

Mr. Banks, you had some witnesses you wanted to have report back on Thursday?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: All right, who are the witnesses you want back on Thursday.

THE DEFENDANT: Mrs. Princess Nance.

THE COURT: Is she here?

THE DEFENDANT: Yes, she is present.

THE COURT: Will she rise? All right, thank you.

And who else?

THE DEFENDANT: And Mr. Joe Louis Pollard, and Mrs. Thelma O'Hara.

THE COURT: All right, you three witnesses are ordered to be back in this courtroom on August the 2nd at [fol. 173] 10:00 p.m. without further order, and you can leave now.

Now, the other witnesses, do you have other witnesses here?

THE DEFENDANT: Yes, they have been excused.

THE COURT: All right, then, they are excused. All right, fine.

Then we are ready to proceed.

THE DEFENDANT: Judge, your Honor, I would like to make a motion at this time that all of the witnesses be cleared of the courtroom and separated.

THE COURT: Yes. Well, we can't separate them because we can't be with them 24 hours a day, but they can be excluded from the courtroom.

All right, then, all witnesses except the first witness to be called will please leave the courtroom and wait outside until you are call.

All right, the Clerk will read the information and state the plea of the defendant.

THE CLERK: Ladies and gentlemen of the jury, you will now hear the reading of the information:

> "In the Superior Court of the State of California, in and for the County of Alameda, the People of the State of California versus Fred Banks, Defendant, number 33698, Information:
>
> "The District Attorney of the County of Alameda hereby accuses Fred Banks of a felony, to wit, attempted robbery, in that on or about the 4th day of [fol. 174] May, 1962, in the County of Alameda, State of California, he attempted to rob Roger Wong of lawful money of the United States.
>
> "Second count:
>
> "And the said Fred Banks is further accused by the District Attorney of the County of Alameda, by

this second count of this Information, of a felony, to wit, robbery, a violation of Section 211 of the Penal Code of the State of California, in that on or about the 4th day of May, 1962, in the County of Alameda, State of California, he robbed Robert Perry of $70.00, more or less, lawful money of the United States.

"Third count:

"And the said Fred Banks is further accused by the District Attorney of the County of Alameda, by this third count of this Information, of a felony, to wit, robbery, a violation of Section 211 of the Penal Code of the State of California, in that on or about the 4th day of May, 1962, in the County of Alameda, State of California, he robbed William Pauletich of $175.00 more or less, lawful money of the United States.

"Signed J. F. Coakley, District Attorney of the County of Alameda, State of California, by Jerry G. Murphy, Deputy District Attorney of the County of [fol. 175] Alameda, State of California.

"Filed May 31, 1962, at 4:21 p.m. Jack G. Blue, County Clerk, by W. Calloway, Deputy."

The defendant upon his arraignment entered pleas of not guilty to each of the three counts of the information, and this is the day regularly set for his trial.

THE COURT: All right, Mr. Murphy, you are recognized for your opening statement.

OPENING STATEMENT ON BEHALF OF THE PEOPLE

MR. MURPHY: May it please the Court, Mr. Banks, members of the jury:

As you know, the defendant here is charged with one count of attempted robbery and two counts of robbery.

Now, first, I would like to tell you something about the elements of the offense of robbery and attempted robbery with which the defendant is charged.

Robbery is the taking, felonious taking of personal property of another from his person or immediate presence accomplished by means of force or fear.

Attempted robbery consists of the intent to do an act coupled with some overt act directed toward the completion of that intent which is interrupted or interfered with for some reason.

Now, the facts of this case took place on the late evening of the 4th day of May of this year.

[fol. 176] First, the attempted robbery took place at Vince's Liquor Store, which is a liquor store located at 1141 Peralta Street in the City of Oakland.

At about 11:00 o'clock on the evening of the 4th day of May, the defendant came into Vince's Liquors. At the time there were several other customers in the store, and the defendant eventually got his turn to get up to the counter.

At that time he said to one of the clerks—There were two clerks there at the time, Roger Wong and Harry Jow. He said to Jow, "Give me all the money."

Now, there are two cash registers at the counter. Jow was standing behind the right-hand cash register facing the customers, Wong was standing approximately behind the left-hand cash register.

Jow made some remark at that time, and Wong was behind the left-hand cash register. His attention was attracted.

The defendant again demanded all the money, and made the statement, "Do you want to die?"

At the time he did that he had his right hand in his coat pocket, he was wearing a sport-type coat, and he lad it on the counter, which is somewhat higher than the table here, with his hand in his pocket.

About that time Wong, who was behind the other cash register, pulled a gun out that he had behind the counter.

And as these remarks were being addressed to the other clerk, Jow, Wong took his gun and slammed it down on [fol. 177] the hand in the pocket of the defendant.

The defendant then stepped back and made a remark to the effect, "Go ahead and shoot me," or words to that effect. Then he turned around and left the store.

About 15 minutes later, and this would be around 11:15 that same evening, the defendant went into another liquor store, which is called the Three Point Liquors, which is located at 1624 Peralta Street, Oakland.

At the time he walked into that liquor store the person behind the counter was a Robert E. Perry.

Now, he made similar remarks to Perry. He demanded the money, "Empty the till," I believe the words were.

"Empty the till," he said, and then added, "I am not kidding, you bet your life I am not kidding," or words to that effect.

Perry will testify that he also had his hand in his pocket as if he had a gun in his pocket.

Perry turned over to him approximately 70 to 80 dollars, about that amount of money, the currency he had in the till.

Shortly after leaving there, obtaining that money and leaving the Three Point Liquors, about 15 or 20 minutes later the defendant walked into a place called the Linden Liquors, which is located at 1051 16th Street, Oakland.

The proprietor there, the person attending the liquor store, was a William Pauletich.

The defendant went up to the counter and demanded the money.

Pauletich's mother was sitting in the back of the count- [fol. 178] er there and she came up. There was a conversation there, and Pauletich said to his mother, "He wants the money."

Mrs. Pauletich took about $160.00 or so from the cash register, gave it to the defendant, the defendant took the money and left the store.

A short while after that, the same evening, that would have been around 11:30, about a quarter to 12:00 or so, the defendant walked into the fourth liquor store, this was the Sobek Liquors, which is located at 2100 Market. And at the time he went in there, the proprietor, whose name was Coatsie Smith, was behind the counter.

The defendant said to him, words to the effect, "Do you own this place? Do you have a gun here?"

Smith asked him why he wanted to know, and he said, "Why, I just might want to hold you up."

Immediately after that, two police officers walked into the Sobek's Liquors and placed the defendant under arrest.

Now, basically, that would be the evidence presented in this trial. There will be, also, actually, on the Three Point Liquors, there will be two other witnesses, persons who came into the store while the robbery was going on.

Basically, that will be the evidence that will be shown by witnesses in this case.

THE COURT: All right, Mr. Banks, do you wish to make your opening statement now or reserve your statement until you start your case?

[fol. 179] THE DEFENDANT: I will reserve my statement until I start my case.

THE COURT: All right, the People will call their first witness.

MR. MURPHY: The People will call Inspector Zweigle.

GILBERT ZWEIGLE,

called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, please.

THE WITNESS: Gilbert Zweigle, Z-w-e-i-g-l-e.

DIRECT EXAMINATION

Q. (By Mr. Murphy) You are an inspector with the Oakland Police Department; is that correct? A, Yes, sir.

Q. Inspector Zweigle, did you have occasion to investigate the case at law, being a charge of attempted robbery and two charges of robbery against Mr. Fred Banks? A. Yes, sir.

Q. Were you the inspector in charge of investigating that particular case? A. Yes, sir.

Q. Inspector, I want to show you, first of all, a list of nine names.

MR. MURPHY: First, I will show them to Mr. Banks.

THE DEFENDANT: All right.

Q. (By Mr. Murphy) I am showing you this list of [fol. 180] nine names. Will you examine that, please? A. (Witness does same.)

Q. Now, in the course of your investigation of this case, did you have occasion to either personally contact

any of those people, or, to your knowledge, were they contacted by other officers in the investigation of this case? A. Yes, sir.

Q. All of those were contacted? A. Yes, sir.

Q. Either by yourself or other officers; is that correct? A. That is correct.

MR. MURPHY: May this be marked as People's Exhibit No. 1?

THE COURT: All right, it will be marked as People's Exhibit 1 for identification.

You have seen this, have you, Mr. Banks?

THE DEFENDANT: Yes, I have, your Honor.

THE COURT: All right.

(List of nine names above-referred to was marked People's Exhibit No. 1 for identification.)

Q. (By Mr. Murphy) Now, Inspector, I am going to show you a list of actually 16 separate documents. First of all, I will just hand them to you one by one, and you can look at them and see if you recognize them. A. All right.

Q. First of all, a yellow sheet of paper containing reference to notes of a conversation with a witness named Jones and another witness named Griffith. Do you recognize that piece of paper?

[fol. 181] THE DEFENDANT: If it please your Honor, I object. The defendant hasn't even seen the notes he handed to Mr. Zweigle.

THE COURT: Yes.

MR. MURPHY: All right, I will show them all to you.

THE DEFENDANT: All right.

Q (By Mr. Murphy) Now, as to this first document containing the names, "Witness Jones," and "Witness Griffith," do you recognize that document? A. Yes, sir; those are notes I made on the 5th of May.

MR. MURPHY: All right, may this be marked as People's Exhibit No. 2 for identification?

THE COURT: All right, People's Exhibit No. 2 for identification only.

(Document containing the names "Witness Jones" and "Witness Griffith" was marked People's Exhibit No. 2 for identification.)

Q. (By Mr. Murphy) I will show you a yellow piece of paper with five names appearing on it, "Roger Wong, Witness Jow, Robert Perry, George Griffith," and "Robert Jones." Do you recognize that particular document? A. Yes, sir. Those are notes made during the lineup.

THE COURT: That will be Exhibit 3 for identification only.

(Yellow piece of paper containing five names thereon was marked People's Exhibit No. 3 for identification.)

Q. (By Mr. Murphy) And another document, a yellow sheet of paper, with notes of a conversation with Witness [fol. 182] Pauletich, among other things. A. Yes, those are notes I made during the investigation.

MR. MURPHY: People's No. 4 for identification?

THE COURT: Yes, Exhibit 4 for identification only.

(Document—notes of a conversation with Witness Pauletich was marked People's Exhibit No. 4 for identification.)

Q. (By Mr. Murphy) Another yellow sheet of paper containing notes of conversations with Joe Pollard, William J. Campbell, Princess Nance. A. Yes, sir, those are notes I made.

MR. MURPHY: People's No. 5 for identification?

THE COURT: All right, Exhibit 5 for identification.

(Yellow sheet of paper containing notes of conversations with Joe Pollard, William J. Campbell and Princess Nance was marked People's Exhibit No. 5 for identification.)

Q. (By Mr. Murphy) Another yellow sheet of paper with notes of a conversation with Coatsie Smith and notes of a conversation with Defendant Banks. I ask you if you recognize that. A. Yes, those are notes I made.

MR. MURPHY: People's No. 6 for identification.

THE COURT: All right, 6 for identification.

(Yellow sheet of paper with notes of conversation with Coatsie Smith and Defendant Banks was marked People's Exhibit No. 6 for identification.)

Q. (By Mr. Murphy) And another typed document entitled, "Arrest Report," containing police notes of a [fol. 183] conversation with one Coatsie Smith. Do you recognize that document? A. Pardon me, what was that last part about Coatsie Smith?

Q. Containing notes of a conversation by a police officer with Coatsie Smith. A. Yes, this is the police report that was assigned to me.

Q. There is also reference to Sobek's Liquors on that? A. Yes.

MR. MURPHY: People's No. 7?

THE COURT: All right, 7 for identification.

(Typed document entitled "Arrest Report," was marked People's Exhibit No. 7 for identification.)

Q. (By Mr. Murphy) And another document entitled, "Robbery and Theft Report from Person, plaintiff's name, Vince's Liquors; person reporting crime to police, Roger Wong," containing notes of a conversation with Roger Wong and with the name of the reporting officer, "R. Ticksman." Do you recognize that document? A. Yes, that was the Robbery Report that was assigned to me, one of the Robbery Reports.

THE COURT: Exhibit 8 for identification only.

(Document entitled "Robbery and Theft Report," was marked People's Exhibit No. 8 for identification.)

Q. (By Mr. Murphy) Before I leave that document, I show you a handwritten document entitled, "Robbery and Theft Report from Person, Field," and ask you if you recognize that document? A. I have not seen this [fol. 184] document until I saw it in your possession yesterday. This is the Field copy that is turned in by the officer from which this other copy is typed and forwarded to the inspectors.

Q. In other words, this is a copy, but the original Field report of—

THE CLERK: People's 8?

MR. MURPHY: People's No. 9.

THE COURT: No, People's No. 8.

MR. MURPHY: Well, I haven't introduced this one yet, I don't think.

THE COURT: Yes, that one is the "Robbery and Theft Report from Persons," which is Exhibit 8 for identification.

MR. MURPHY: Vince's Liquors, is that 8?

THE CLERK: Yes.

THE COURT: And the one you have in your hand would be next in order.

MR. MURPHY: All right, this is the original of it.

THE COURT: All right, for identification only, Exhibit 9.

(Handwritten document entitled "Robbery and Theft Report from Person, Field," was marked People's Exhibit No. 9 for identification.)

Q. (By Mr. Murphy) Then another "Robbery and Theft Report; plaintiff's name, Three Point Liquors; person reporting crime to police, Robert Perry," containing notes of a conversation with Robert Perry. Do you recognize that document? A. Yes, this is the "Robbery Report" assigned to me.

[fol. 185] THE COURT: Marked for identification only as Exhibit 10.

(Document entitled "Robbery and Theft Report, Three Point Liquors," was marked People's Exhibit No. 10 for identification.)

Q. (By Mr. Murphy) Showing you another document, do you recognize that document? A. This is a Field copy from which that one was typed, and I had not seen it until yesterday in your office.

THE COURT: Marked for identification only as Exhibit 11.

(Field copy, Three Point Liquors was marked People's Exhibit No. 11 for identification.)

Q. (By Mr. Murphy) Another "Robbery and Theft Report; plaintiff's name, Linden Liquor; person reporting crime to police, William Pauletich," containing notes of conversation with robbed party, William Pauletich, do you

recognize that document? A. Yes, this is the third Robbery Report I received.

MR. MURPHY: People's 12?

THE COURT: Marked for identification only as Exhibit 12.

(Document entitled "Robbery and Theft Report," William Pauletich, was marked People's Exhibit No. 12 for identification.)

Q. (By Mr. Murphy) And another document entitled, "Robbery and Theft Report; plaintiff's name, Linden Liquor; person reporting crime, William Pauletich." This is another handwritten report. Do you recognize that document? A. This would be the same as the other two. [fol. 186] Q. The original of—

THE COURT: Exhibit 12.

MR. MURPHY: Exhibit 12, yes.

THE COURT: All right, it will be marked for identification as Exhibit 13.

(Field copy, "Robbery and Theft Report, Linden Liquors, was marked for identification as People's Exhibit No. 13.)

Q. (By Mr. Murphy) And a two-page typed document entitled, "Case Report, three counts, summary," containing the names of several witnesses. Do you recognize that document? A. Yes, this is the Case Report that I typed after the investigation containing the information needed for prosecution of this case.

Q. Does this refer to all three counts? A. Yes, sir.

MR. MURPHY: People's next in order, No. 14.

THE COURT: It will be marked for identification Exhibit 14.

(Two-page typed document entitled "Case Report" was marked People's Exhibit No. 14 for identification.)

Q. (By Mr. Murphy) And, finally, a three-page yellow, or three yellow pages of documents stapled together. It appears to be a statement of Fred Banks. Do you recognize that document? A. Yes, it is the statement I took from the defendant on the 5th of May.

MR. MURPHY: People's next in order for identification?

[fol. 187] THE COURT: The statement will be marked as People's next in order, Exhibit 15 for identification.

(Three-page statement of Fred Banks was marked People's Exhibit No. 15 for identification.)

Q. (By Mr. Murphy) Mr. Zweigle—

THE DEFENDANT: Your Honor, I object to the statement being admitted in evidence.

THE COURT: None of these are in evidence, Mr. Banks. They are only marked for identification so we can refer to them by number.

THE DEFENDANT: O.K.

Q. (By Mr. Murphy) Now, Inspector Zweigle, referring to this list of names which is on People's Exhibit No. 1, I will ask you this questions: Are all notes of conversations, all statements taken by you or other police officers in the investigation of this case contained in the 15, I believe, documents which you have just examined a few moments ago? A. Yes, sir.

MR. MURPHY: Now, at this time, I will ask for a stipulation from Mr. Banks that all of these documents have been turned over to him.

THE DEFENDANT: I know, your Honor, all of these documents have, but they are not all of the documents this witness has that were taken by the police, I'm quite sure.

THE COURT: Well, we are sort of in a position here of when are we talking to the defendant and when are [fol. 188] we talking to counsel?

So I think we had better skip the stipulations.

MR. MURPHY: All right.

At this time, I will first of all offer the Case file in Action No. 33698, which is the instant case.

THE COURT: This is this case, yes.

MR. MURPHY: Which, in itself, contains reference or receipts for several of the documents.

THE COURT: Well, I don't see anything to be gained by—Oh, yes, we can mark the file for identification, not in evidence, but just in identification, as Exhibit 16.

(Case file in Action No. 33698 was marked People's Exhibit No. 16 for identification.)

MR. MURPHY: Now, that does not include, I don't think that includes all of the documents, but that includes part of them.

THE COURT: It is only marked for identification.

MR. MURPHY: Yes. Well, I wish the record to show that that document shows that—contains receipts for several of the various documents which we have already had identified as having been turned over to the defendant.

In fact, I can enumerate those from the receipts.

THE COURT: Well, it is a matter of record now, so I don't think anything can be gained by going into it any more fully.

MR. MURPHY: All right.

THE COURT: Is it part of the record, and it is [fol. 189] marked for identification.

MR. MURPHY: And I will offer the further statement that several of the other documents of this list have been turned over to Mr. Shaughnessy of the Public Defender's office, who, to my understanding, has delivered these to the defendant.

Now, I can call Mr. Shaughnessy if that is considered necessary. He is sitting right here.

THE COURT: These are other documents? You have the list there?

MR. MURPHY: I have a list here of all of the documents which—

THE COURT: You have delivered.

MR. MURPHY: Which we have delivered.

THE COURT: Well, I think we can mark that for identification.

MR. MURPHY: All right.

THE COURT: That will be Exhibit 17 for identification.

(List of all documents which were delivered to the defendant was marked People's Exhibit No. 17 for identification.)

MR. MURPHY: That is all we have of Inspector Zweigle at this time.

THE COURT: All right, do you have any questions you wish to ask, Mr. Banks?

Now, we are going to be limited just on these documents at this time.

THE DEFENDANT: Your Honor, just on the documents?

[fol. 190] THE COURT: Yes.

THE DEFENDANT: You are just only calling him, putting him on the stand for to verify these different documents; is that it?

THE COURT: That is all.

THE DEFENDANT: In other words, they are not calling him for a witness to none of the stuff that he had taken?

THE COURT: Well, the documents are not in evidence, themselves.

THE DEFENDANT: Yes.

THE COURT: So the contents, actually, are not before the Court, of the documents.

THE DEFENDANT: O.K.

THE COURT: Now, you are somewhat in the position, if you start getting into the contents, then are you are going to be in effect offering the documents to the jury.

MR. MURPHY: Might I make a statement, your Honor?

THE COURT: Yes.

MR. MURPHY: The purpose of offering these documents is just to put on the record that they have been delivered to the defendant. That is the only purpose.

THE COURT: Yes.

MR. MURPHY: Of this testimony.

THE COURT: All right.

THE DEFENDANT: Well, your Honor, I have received most of the documents, all of the documents that I think that he have here, but I am still inquiring about [fol. 191] other documents which I still believe exists.

THE COURT: All right, you can ask the witness about the existence of other documents.

THE DEFENDANT: That is what I would like to go into.

THE COURT: These, of course, would be documents of the Oakland Police Department.

THE DEFENDANT: That's right.

THE COURT: All right.

CROSS-EXAMINATION

Q. (By the defendant) Mr. Zweigle, in the case of robbery reports do they have any documents that they transmit to the radio room which you send out to the squad cars reporting different crimes? A. The officer in the radio room makes an, I'm not sure what they call it, I believe, an assignment slip, and when the call is broadcast, it is stamped with the time so they can keep track of the time that the officer gets the call, and that is filed, and that is it.

Q. And then, also, after an officer visits the crime, he makes certain notes, is that right, of— A. Yes, he fills out a Field copy which is marked for identification.

Q. Which is marked, and he also reports back to the radio room on a dispatch, doesn't he? A. He radios back when he is through.

[fol. 192] Q. And they also makes a copy of that, am I right? A. I think they stamp it again when the assignment is cleared.

Q. Well, now, isn't it possible that you do have—come in contact with these copies? A. Never.

Q. You never do? A. No.

Q. But you do admit that these copies do exist, am I right? A. Oh, I admit that, yes.

THE DEFENDANT: All right, that is all.

THE COURT: Anything further, Mr. Murphy?

MR. MURPHY: Nothing further.

THE COURT: All right, that is all, Inspector. Thank you. The witness is excused.

(Witness excused.)

THE COURT: I will again admonish the jury not to discuss the case among themselves or with anyone else or to form or express any opinion at this time.

We will recess until 1:30.

(Whereupon at 12:00 noon a recess was taken until 1:30 o'clock p.m. of the same date.)

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* * * *

[fol. 199] TUESDAY, JULY 31, 1962

PROCEEDINGS IN OPEN COURT
1:45 P.M.

* * * *

PHILLIP SMITH,

called as a witness on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: What is your name, please?
THE WITNESS: Smith, Phillip.
THE CLERK: Smith, Phillip?
THE WITNESS: Yes, Phillip Smith.
THE CLERK: Thank you.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Smith, you are an inspec-
[fol. 200] tor in the Alameda County District Attorney's office; is that correct? A. That is correct.

Q. Now, Mr. Smith, if you will take a look at what appears to be a City diagram on the board to your right, can you identify what that particular diagram is? A. That is a street map of a portion of Oakland.

Q. All right. Now, just roughly, would you indicate the border streets that are included in that diagram? A. This is a map from Broadway down to Wood Street, and this would be down by the Southern Pacific Railroad tracks, and the 16th Street Station is down in this area.

THE COURT: Is Broadway on the east, Wood Street and the Southern Pacific marshalling yards on the west?

THE WITNESS: That's right.

THE COURT: All right.

THE WITNESS: And then you have 8th Street, which would be to the, I guess that would be to the south, to 32nd Street.

THE COURT: On the north.
THE WITNESS: Yes.
THE COURT: All right.
Q. (By Mr. Murphy) Now, Mr. Smith, are you familiar with the area depicted in that map? A. Yes, I am.
Q. Does that diagram to your knowledge fairly represent the location of the various streets shown on the diagram? A. Yes, it does.
Q. Now, first of all, on that diagram—First of all, do [fol. 201] you know where Vince's Liquors is?
THE COURT: Now, just a minute, this is apparently a photocopy of a map. Is that what you are using?
THE WITNESS: Yes, sir.
THE COURT: Now, where is the original of the map?
THE WITNESS: It is with the Street Department, City of Oakland.
THE COURT: Of what?
THE WITNESS: City of Oakland.
THE COURT: Now, this was copied from an official record of the Street Department of the City of Oakland?
THE WITNESS: Yes, sir.
THE COURT: All right, this is a photocopy of the official records.
THE WITNESS: Of the official map.
THE COURT: Of course, of a section of the original.
THE WITNESS: Yes.
THE COURT: All right, Mr. Banks, do you have any questions as to the map itself being an authentic copy of a map?
THE DEFENDANT: Yes.

VOIR DIRE EXAMINATION

Q. (By the defendant) Was that made from a small map or a map that is larger than it is? A. I am not exactly sure what it was made from. They have in the Street Department, of course, maps of the City of Oak- [fol. 202] land, and, of course, this was photographed from the official map of the City of Oakland. As to the size of that map, I don't know.

Q. You don't know the actual size of the map, whether it was a small map that it came from or whether it was a larger map than that? A. No, I don't.

Q. In fact, you didn't even make the map, is that it? I mean, you didn't even photograph the map, is that it? A. No, I didn't.

THE DEFENDANT: What I am trying to figure out now is being he didn't photograph the map I wouldn't know it was a facsimile or not of the streets of Oakland because I am not familiar with all this.

THE COURT: Neither am I, Mr. Banks.

THE DEFENDANT: So I would have to go to someone with much more authority, so I believe I would object to all that.

MR. MURPHY: I believe I asked the witness, himself, if he is familiar with the area shown by that map, and he testified he was.

And the map now, if I recall, represents the area shown in the map.

THE COURT: Counsel, I assume what you want to do is not only show location but distance between.

MR. MURPHY: Not necessarily distance between, just by location the distance between, yes, not the length of the blocks. They are of no moment.

[fol. 203] I want to show on the map the location of the places involved in this action and their relationship to each other.

THE COURT: Well, there is no question if the witness can recite the streets from north south and from east to west he can use that map the same as he could one he drew himself.

There would be no assurance that the scale is correct, but as far as location and what street is next to what street, that would be all right.

MR. MURPHY: Yes. This is not offered at this time purportedly to be drawn to any particular scale, but sketchily to show the relationship in the City of Oakland of these places involved in this action.

THE DEFENDANT: Well, in this particular case where there is no scale to mark the distance of any particular site or how far it is between, I would think that

therefore that the map should be an authentic map where we can get the distance between the locations exact, because this map here is uncertain and therefore it wouldn't afford a true picture of the City of Oakland.

It just says, "City block." What is the distance of the City block? Some city blocks are long, some city blocks are short, but how long or how short we don't know.

MR. MURPHY: I don't think it is part of this particular testimony.

THE COURT: Not unless you are going to use distances, no.

MR. MURPHY: I am going to ask this witness if he [fol. 204] can show from his own knowledge how many blocks it is from one place to the other, from his own investigation of the particular locations of these incidents.

And I think he can testify from his own knowledge as to that and also with reference to the map.

THE DEFENDANT: Well, that would require distances.

THE COURT: No. If he is going to use just blocks without making any reference to how many feet or yards were involved, it wouldn't.

But it certainly doesn't make much sense if you don't go into the distance.

THE DEFENDANT: That's right.

MR. MURPHY: Well—

THE COURT: If we were interested in the length of an average block, that would be one thing; but we are going to be interested in the length of specific blocks.

MR. MURPHY: Well, part of the testimony would simply be that these are ordinary city blocks, to his knowledge, in that particular area. I think he can testify to that.

If the defendant wants to bring in a witness to show that a block is a certain distance, why, he can do so.

THE COURT: Well, if you are not going to go into any distances, and the witness can testify as to the location of streets—

MR. MURPHY: That is all we are doing.

THE COURT: It can be used for that purpose, but [fol. 205] not for the question of the matter of distance.

MR. MURPHY: At this point we are not intending to go into any such matter.

THE COURT: All right. Actually, there is no testimony this is drawn to scale.

MR. MURPHY: No.

THE COURT: It is merely a question of are the streets in the right place and correctly named.

MR. MURPHY: Yes, that is all we are doing at this time.

THE COURT: All right.

DIRECT EXAMINATION (Resumed)

Q. (By Mr. Murphy) Mr. Smith, do you know where Vince's Liquors—

THE COURT: Well, the witness hasn't testified to that yet.

MR. MURPHY: Well, I am asking him if he knows where Vince's Liquors is in the City of Oakland.

THE COURT: All right.

Q. (By Mr. Murphy) Do you know where it is? A. Yes, I do.

Q. And have you actually visited that particular liquor store, yourself? A. Yes, I have.

Q. Could you mark on that map as to where that liquor store is? A. Yes.

THE COURT: After he has identified all the streets are in the correct place.

[fol. 206] MR. MURPHY: All right.

Q. Are these streets on that map—Withdraw that.

Have you, yourself, on more than one occasion visited that particular area in the City of Oakland? A. Yes, I have.

Q. And on how many occasions have you visited there, if you can recall, if you can mention any particular number? A. Oh, quite a few, probably 25 or 30 times in the last month.

Q. And to your knowledge, are the streets between, or specifically, between 16th Street, on Peralta Street between 16th and 11th Streets, are those, is that map true, accurately depict the location of those streets and the location of the cross streets on Peralta between 11th and 16th? A. Yes, they do.

Q. All right, now, does the map accurately depict the streets, the cross streets on 16th from Peralta up to Linden Street? A. Yes, they do.

Q. And does that map, to your knowledge, are the names of the cross streets on 16th between Peralta and Linden accurately named on the map? A. Yes, they are.

Q. No, on 16th Street between Linden and Market, are the streets accurately named on that map? A. Yes, they are.

Q. And between Market Street—On Market Street between 16th and 21st, are the streets accurately depicted on that map in relationship to each other? A. Yes, they are.

[fol. 207] Q. Now, from your actual visit to the place known as Vince's Liquors at 1141 Peralta, can you show on that map a mark where that particular liquor store is located?

THE COURT: Now, just a minute. Mr. Banks, have you any questions on the names of the streets and the order in which they appear on the map in that area that he has referred to?

THE DEFENDANT: I am not familiar exactly with the City of Oakland, as I told your Honor.

THE COURT: I couldn't understand what you said.

THE DEFENDANT: I am not familiar with the City of Oakland, so, therefore, I haven't examined the map thoroughly to find out where all of the streets are, myself.

So, therefore, if he doesn't mind letting me inspect the map a little bit—

MR. MURPHY: Not at all.

(Defendant inspects map.)

THE DEFENDANT: Yes, I have examined the map, your Honor.

THE COURT: All right.

THE DEFENDANT: And I don't see any designation of any particular location just other than the streets.

THE COURT: Yes, that is correct.

THE DEFENDANT: And the names is all. So I have no questions along that line at present.

THE COURT: All right, continue, Mr. Murphy.

Q. (By Mr. Murphy) All right, now, would you indicate with an "X" on that map the location of Vince's [fol. 208] Liquors? A. It is right here on the corner of 12th and Peralta.

Q. All right, draw a line out from that and mark it as "S-1," if you will. A. (Witness does same.)

Q. Now, have you or do you know where a liquor store known as the Three Point Liquors Store at 1624 Peralta is located on that map? A. Yes, I do.

Q. You visited that particular liquor store yourself? A. Yes, sir.

Q. Now, are you able to place an "X" or mark on that map where that particular liquor store is located? A. Yes, I am.

Q. Will you do that, please? A. (Witness does same.)

Q. All right, mark that as "S-2," if you will. A. (Witness does same.)

Q. Now, do you, or have you personally visited a liquor store known as Linden Liquors at 1051 16th Street, Oakland? A. Yes, I have.

Q. And can you locate that particular liquor store on that map? A. Yes, I can.

Q. Will you do that, please? A. (Witness does same.) Shall I mark this "S-3"?

Q. Yes, "S-3." A. (Witness does same.)

Q. Now, have you personally visited a liquor store [fol. 209] known as Sobek's Liquors at 2100 Market? A. Yes, I have.

Q. Can you locate on that map where that particular liquor store is located? A. Yes, I can.

Q. Will you do that, please? A. (Witness does same.)

Q. Will you mark that "S-4," then? A. (Witness does same.)

MR. MURPHY: All right, that is all I have of this witness.

THE COURT: All right, Mr. Banks.

CROSS-EXAMINATION

Q. (By the defendant) What is your name? A. Smith, Phillip.

Q. Mr. Smith—

THE COURT: Now, Mr. Banks, will you keep your voice up so the jury can hear what questions you ask?

THE DEFENDANT: Yes, sir.

Q. And your address? A. My home address?

Q. Yes. A. 24070 Channing Way, Berkeley.

Q. And you are working for the Survey Department of the City of Oakland? A. No, I don't. I work for the District Attorney's office.

Q. You work for the District Attorney's office; and how long have you been employed in the capacity of—in your job with the District Attorney? A. Since the middle of June.

[fol. 210] Q. Since the middle of June? A. About the 12th.

Q. I see, and you say you are familiar with this map? A. Well, familiar with the area represented by the map.

Q. Yes. A. Yes.

Q. Represented by the map. A. Yes, I am.

Q. And you said the Three Point Liquors is located where? A. 16th and Peralta.

Q. 16th, and do you know the number? A. I am not sure of the number, no, I think it is 1628, something like that.

Q. But, yet, Mr. Smith, you testified that you have been in this area now for some how many days? A. Pardon me, how long have I lived in Oakland?

Q. No, in this area of the liquor store. A. Oh, the last time I was at Three Point Liquors was on Friday.

Q. Friday, and you have been there how many times since then? A. Since?

Q. Or before then, I'll say. A. I have been inside the Three Point Liquor about four times, three times, perhaps.

Q. What was your particular purpose in going to this area?

MR. MURPHY: Well, I will object to that a irrelevant at this time, and also beyond the scope of the direct examination.

THE COURT: It is beyond the scope of the direct.

It could be used to show prejudice and bias. You can [fol. 211] go into it to that extent.

THE DEFENDANT: It is my understanding he had finished with the witness on direct, didn't he?

THE COURT: Yes, he is finished.

THE DEFENDANT: And therefore, on cross, concerning this area, he employed him for a particular purpose to go into this area for a particular purpose.

THE COURT: Well, I don't believe Mr. Murphy employed him.

THE DEFENDANT: Well, I mean the State's Attorney did, and on top of that he employed him to locate these particular points for that particular purpose.

THE COURT: Well, maybe we can save some time.

Mr. Murphy doesn't employ anybody in the District Attorney's office.

THE DEFENDANT: Yes, well, the District Attorney does.

THE COURT: Mr. Smith, you were assigned to Mr. Murphy to work on this case, were you?

THE WITNESS: Yes.

THE COURT: All right, he was merely assigned to him to work on this particular case.

THE DEFENDANT: Yes. The particular point was even though he is assigned, your Honor, to go into this area for some design to familiarize himself with the location—

THE COURT: That's right.

THE DEFENDANT: So if he is familiar with the location, I think the defendant is entitled to know how long and why.

[fol. 212] THE COURT: I agree with you, no one is stopping you from asking questions.

THE DEFENDANT: Well, all right.

Q. Why was you sent to this area for to make this particular survey? A. You mean, why was I in this particular liquor store? I went down there to subpoena—

Q. No, in this area. A. In this area?

Q. Yes. A. At which time.

Q. On all the times that you were there. A. During the course of my work?

Q. Yes. A. I have occasion, perhaps, to subpoena some witnesses for various crimes not partciularly this case but various other cases, so I have been in this area on many occasions due to this particular thing.

Q. And only since June, is that right, you have been assigned to the Deputy District Attorney here to peruse this particular area for this particular case; is that right? A. Yes, since June.

Q. And you have been in that area, again, since you have been assigned to this case, four times? A. No, I have been in that area 25 or 30 times, but I have been to that liquor store about three or four times.

Q. And in this particular liquor store, which is located [fol. 213] on Peralta, are you by any means traveling in a car? A. Yes, I was.

Q. You was traveling in a car. Well, how long did it take you to reach from Mr. Linden's liquor store to the Three Point Liquor Store? A. From Linden Liquor to Three Point Liquor?

Q. Yes. A. A couple of minutes.

Q. And if you was walking, how long would it take you to reach that particular point? A. Oh, five or ten minutes, walking quickly.

Q. Five or ten minutes. Now, Three Point Liquor is located on the corner of 16th and Peralta? A. It is located on sort of a "V" almost where Chestnut comes into Peralta.

Q. Is that Three Point Liquor on Chestnut and Peralta? A. Well, the way the streets are—Do you want me to go to the map?

Q. Yes. A. The way these streets come together, here is 16th, and Peralta is here, and then Center Street, excuse me, not Chestnut but Center Street comes together at a "V", and these three streets come together at 17th right there, between 16th and 17th on Peralta.

Q. Would you say it was on Peralta and Chestnut? A. I didn't say that. I said I thought it was. I had forgotten for a second.

[fol. 214] Q. And, by the way, where is Linden Liquor Store located at? A. It is on the corner of 16th and Linden Street, right on the corner.

Q. Right on the corner? A. Yes.

Q. And where is 21st Street Liquor located? A. That is at 2100 Market Street, at the corner of 21st and Market.

Q. And where is Vince's Liquor Store located? A. It is 1141 Peralta, right here on the corner of 12th and Peralta. It is also on the corner.

Q. Also on the corner, all right. And you visited these particular liquor stores to serve subpoenas, is that right? A. Yes, sir.

Q. In the nature of your work? A. Yes.

Q. In dealing with this particular case? A. Yes.

Q. Now, I am going to ask you another question. How long would it take you to cover that whole entire area if you was walking on foot?

THE COURT: Now, what area are you referring to, Mr. Banks?

Q. (By the defendant) I will say from Three Point Liquor Store to Vince's Liquor Store to Linden Liquor Store. A. And in that order?

Q. Yes. A. Oh, I would say probably walking at a moderate rate, normal rate, probably about five or six [fol. 215] minutes from Three Point Liquor to Vince's Liquor, and from Vince's Liquor Store to Linden Liquor Store probably five to ten minutes, probably about ten minutes, walking quickly.

Q. Are you sure that all the names on that particular map is accurate? A. To the best of my knowledge, yes.

Q. To the best of your knowledge. And that map that covers that particular vicinity is accurate, to the best of your knowledge? A. Yes.

THE DEFENDANT: No more further questions.

MR. MURPHY: That's all the questions I have. No further questions.

THE COURT: All right, the witness is excused.

(Witness excused.)

MR. MURPHY: Roger Wong.

ROGER WONG

called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Roger Wong.
THE CLERK: That is spelled W-o-n-g?
THE WITNESS: Yes.
THE CLERK: Take the stand, please.

[fol. 216] DIRECT EXAMINATION

Q. (By Mr. Murphy) What is your occupation, Mr. Wong? A. I am a market owner and grocer. It is also a liquor store.

Q. What is the name of your market? A. Vince's Liquor.

Q. Where is Vince's Liquor located? A. 12th and Peralta.

Q. Is that in the City of Oakland, County of Alameda, State of California? A. Yes, sir.

Q. Mr. Wong, showing you a picture of the outside of the building, do you recognize that building? A. Yes.

Q. And what is that? A. Vince's Liquor.

Q. That is Vince's Liquor, your place of business? A. Yes.

MR. MURPHY: May that be marked as People's next in order? I offer that in evidence.

THE COURT: Yes, all right.

(Photograph—Vince's Liquor, was received in evidence and marked People's Exhibit No. 18.)

Q. (By Mr. Murphy) Showing you another picture, Mr. Wong, do you recognize the scene depicted in that picture? A. Yes.

Q. What does the scene show in the picture you have in your hand? A. That is the inside of the store.

[fol. 217] Q. Inside of Vince's Liquor Store? A. Yes.

MR. MURPHY: May this be marked as People's next in order in evidence?

THE COURT: All right, that will be Exhibit 19 in evidence.

(Photograph showing interior of Vince's Liquor was received in evidence and marked People's Exhibit No. 19.)

Q. (By Mr. Murphy) Now, Mr. Wong, calling your attention to May 4, 1962, at about 11:00 o'clock in the evening, or about 11:00 p.m., were you in your liquor store at that time? A. Yes.

Q. Now, at that time did anything unusual happen? A. Yes.

Q. All right, will you describe to the jury just what that was? A. Well, at that time about 11:00 o'clock one of my boys and myself together were working inside, and there were about five or six customers there.

Q. Who is your boy that was working with you? A. Harry Jow.

Q. All right. A. Five or six customers were in there, and some guy comes in, you know, and robbed the store.

Q. All right. Now, you say some guy came in. Do you see that person in the courtroom today? A. Now?

Q. Yes. A. Yes.

[fol. 218] Q. Will you point to him if you see him in the courtroom? A. That is the man.

MR. MURPHY: Indicating—

THE COURT: The witness has indicated the defendant.

Q. (By Mr. Murphy Now, you say he came in and robbed the liquor store. Will you describe what happened from the time that man first came to your attention? A. Well, I was taking care of a customer at that time. We got two checking counters and two cash registers. I am on that side, see, and not too busy. The other boy is on the busy side. At that time I take care of the customer, and a gentleman come in, you know, got his hand in his pocket on top of the counter there. I didn't know that at first.

Q. All right. Would you stand up for a moment? Will you demonstrate that again for the jury? A. Like this (indicating).

MR. MURPHY: May the record show that he has his right hand inside of his right coat pocket?

THE COURT: Yes.

A. (Continuing) And at that time, I didn't know, I didn't pay much attention, I busy taking care of customer.

Q. (By Mr. Murphy) Just a minute. Now, would you demonstrate how you started to put your hand on the desk? Now, does the desk represent the counter? Is that what you are indicating? A. Yes.

Q. The counter in your liquor store? A. Yes, sir.

[fol. 219] Q. All right. Now, what kind of a coat did this man have on? A. Dark.

THE COURT: You may sit down, Mr. Wong.

Q. (By Mr. Murphy) Was it a coat like you have on, or what? A. No, kind of like you have on, sport coat.

Q. Sport-type coat. All right. Now, showing you this picture which is People's Exhibit No. 19—You say there was two cash registers in the store; is that right? A. Yes. Here is one and here is another one right here (indicating), with this gentleman right next to it.

Q. The person in the picture is right in front of the cash register on the left-hand side; is that correct? A. Yes.

Q. And you were standing by which cash register? A. This one.

Q. Which would be the right-hand one in the picture? A. That is correct.

Q. In this picture, it is on the right. A. Like this one (indicating).

Q. And where was Mr. Jow when the man came in? A. At that one (indicating).

Q. He was behind the other cash register? A. Yes.

Q. Which would be the left-hand one in that picture; is that right? A. Yes.

Q. Now, who did this man talk to first? A. Talked to Jow.

[fol. 220] Q. And what conversation was there? What did he say to Jow at the time? A. At first I didn't hear, I didn't know, and later on I hear, "You want to die? Give me all the money." Then I hear.

Q. What did you do when you heard him make that

statement? A. Oh, I walked a little over, I take a peek, you know, I take a peek like this (indicating), I saw his hand on top of the counter, and I grabbed my gun and hit him.

Q. And where did you hit this man with the gun? A. On the hand in the pocket.

Q. Will you show us again on the counter? A. See, I hit right on top here.

Q. When you say you hit his pocket resting on the counter, you hit his hand with your gun; is that right? A. Yes.

Q. What kind of gun was that, incidentally, Mr. Wong? A. A .38.

Q. All right, what did he do after you hit his hand with the gun? A. I told him to put his hands up, but he didn't, he just cussed me out.

Q. You said, "Put your hands up"? A. I told him to put his hands up, he didn't, but he cussed me out, you know.

Q. All right, continue. A. So my partner tell me, "Shoot him," and I have got so many customers in there [fol. 221] that I don't want to shoot, I don't want to kill nobody.

Q. All right, what happened after that? A. After that, he cussed me, and he walked out and run away.

Q. When he got to the outside of the liquor store, in what direction did he go? Did he turn to the left or to the right? A. He went down Peralta, that side (indicating), I mean, 13th Street side.

Q. Well, I will show you the picture of the front of the liquor store. Would that be on 12th, would you say? A. He ran down the street.

Q. And he was going toward 13th; is that right? A. Yes, going toward 13th and Peralta.

Q. Coming out of the liquor store, just to be clear on it, did he turn to the left or what? Just take an area and show in what direction he went. A. Like this (indicating).

Q. All right. A. This is Peralta, and he went straight down.

THE COURT: We understand this automobile wasn't there at the time, but he would have passed behind that automobile.

THE WITNESS: Yes.

THE COURT: And went down that way (indicating).

THE WITNESS: Yes.

THE COURT: All right, fine.

MR. MURPHY: May I show these to the jury? I [fol. 222/223] think they are in evidence.

THE COURT: Yes.

MR. MURPHY: Pass them around if you will.

(Counsel hands photographs to jury.)

Q. (By Mr. Murphy) Now, after this man went out of the liquor store, or, incidentally—

Withdraw that.

Did he get any money from you at the time? A. No.

Q. To your knowledge, did anyone start to give him any money? A. Jow tried to, you know.

Q. Well, what exactly did Jow do that you observed? A. Well, I seen him punch that cash register, and when it opened he still didn't give him the money. He said, "Hurry up, give me all the money," and Jow said, "All the money," a little louder to attract my attention.

THE DEFENDANT: Your Honor, the witness stated in front that he didn't hear what was said. He stated in front previously before he didn't hear what was said.

He stated on the stand he heard, "Do you want to die?" Then he stated he didn't hear any more.

I object to that as irrelevant and hearsay because he stated already he hadn't heard any words that were spoken to Jow.

MR. MURPHY: Your Honor, I think what the witness said was that the first words he heard from Jow was what he related. He didn't hear anything before that.

[fol. 224] THE DEFENDANT: He said he drew a gun and he left the store.

THE COURT: You can go into it, Mr. Murphy.

MR. MURPHY: All right.

Q. Did you hear the first words that the man that

came in there said to Jow? A. No. In fact, I didn't even know he was there.

Q. The first words you heard were what you already related, "Do you want to die? Give me the money"; is that right? A. Yes.

Q. Now, after this occasion when this man was in the liquor store and went out after you hit him, did you have occasion to see him again? A. Not until the next morning.

Q. All right. Where did you see him the next morning? A. In the police lineup.

Q. And were there other people in this lineup that you mention? A. What do you mean?

Q. Were there other people in the lineup besides the man that you said— A. Oh, yes.

Q. How many people were in the lineup? A. Altogether, about five or six of them.

Q. All right. Did you look at them some way in the lineup? A. Yes, inside the room you look through some kind of glass.

Q. All right, and did you see this person in the lineup [fol. 225] that had been in your liquor store the night before? A. Yes.

Q. Did you identify him at that time? A. Yes.

Q. Is your answer—

THE COURT: Answer audibly so the reporter can take it down.

THE WITNESS: Yes, yes.

THE COURT: All right, fine.

Q. (By Mr. Murphy) Now, after this lineup, did you have occasion to examine any part of the defendant's person? A. Yes, I examined his hand.

Q. And when exactly did you do that? A. Right after the lineup.

Q. And what hand did you examine? A. Pardon me?

Q. What hand did you examine? A. This hand (indicating).

THE COURT: You are indicating your—

THE WITNESS: Right hand.

THE COURT: —right hand. All right.

Q. (By Mr. Murphy) And what part of his hand did you look at? A. Right there (indicating).

Q. You are indicating the back of the right hand? A. Yes.

Q. What did you see? A. All I see is a black spot on top.

Q. On top of the back of his right hand you were in-
[fol. 226] dicating? A. Yes.

Q. Now, when you saw this man in the lineup—
Withdraw that.

When you saw the man in the liquor store, did he have a hat on or not? A. Yes.

Q. All right. Now, when you saw this man in the line-up that you said was the same man, did that man have a hat on or did he not have a hat on? A. At first he had no hat on, and then I wanted to make sure so I told the inspector, "Tell all the people in the lineup to put a hat on."

Q. And did the inspector have them put a hat on? A. Yes, they all put hats on.

Q. Do you remember which person in the lineup you identified? A. No. 3.

MR. MURPHY: All right, I believe that is all I have of this witness.

THE COURT: All right, Mr. Banks, you stay a little way away from him and you speak loud enough so all the jurors can hear you.

THE DEFENDANT: All right, sir.

CROSS-EXAMINATION

Q. (By the defendant) Your name is Roger Wong; is that right? A. Yes.

MR. MURPHY: Excuse me. Before we go on, I had [fol. 227] a couple of other questions I neglected to ask the witness.

THE COURT: All right, you can ask him.

MR. MURPHY: I wanted to have the witness identify some clothing.

THE DEFENDANT: He can't, your Honor, because he said he had finished with him.

THE COURT: He can reopen.

THE DEFENDANT: My understanding of the rules and procedure was when he have finished his direct, then the defendant can go over to cross; and then if he wants to bring him back, he can bring him back on redirect. Am I right?

THE COURT: He doesn't want to go on redirect.

THE DEFENDANT: Then I haven't finished cross.

THE COURT: Well, the Court has the discretion to allow him to reopen his direct examination, having forgotton a question apparently on clothing.

So, go ahead, Mr. Murphy.

DIRECT EXAMINATION (Reopened)

Q. (By Mr. Murphy) I want to show you a jacket.

THE DEFENDANT: I want to raise an objection, your Honor.

THE COURT: Objection overruled.

THE DEFENDANT: I want to raise an objection to another point, your Honor.

THE COURT: All right.

[fol. 228] THE DEFENDANT: I want to raise an objection at this point to supress the evidence for being illegally seized, and also make a motion verbally for return of the property which were illegally seized.

THE COURT: This is your property?

THE DEFENDANT: It is, sir.

THE COURT: All right. Well, the matter of seizure would—

I assume you know more about the seizure, whether or not it would go into hearsay and evidence that isn't admissible, Mr. Murphy.

MR. MURPHY: Well, I think ordinarily you would want this outside the presence of the jury, but I can simply say this.

There would be testimony of an officer later on after the arrest of the defendant that this clothing was taken from him.

That is what it amounts to. I don't think there is any search and seizure problem there.

There will be evidence in the case that he was arrested.

THE COURT: Well, we will take the afternoon recess at this time, and then we can go into that in chambers.

I will again admonish the jury not to discuss the case or form or express any opinion at this time.

(Afternoon recess taken)

PROCEEDINGS IN CHAMBERS
OUTSIDE THE PRESENCE OF JURY
2:30 P.M.

THE COURT: All right, we are in chambers. The [fol. 229] defendant is present, Mr. Shaughnessy, Mr. Murphy, Clerk, reporter, Bailiff.

MR. MURPHY: As to the taking of the clothing, the offer of proof would be this.

THE COURT: Well, this is a matter of Mr. Banks claiming it was illegally taken.

THE DEFENDANT: That's right. I was illegally arrested, your Honor.

When you are arrested without a warrant, you are supposed to be carried before a magistrate, and as long as you are not carried before a magistrate, you are illegally arrested.

That is, when you are arrested without a warrant; and I was arrested without a warrant. My clothing was taken from me and I wasn't carried before the magistrate until on a Tuesday.

THE COURT: I haven't the slightest idea when you were arrested, but—

THE DEFENDANT: So all my stuff was taken from me before Tuesday, so, therefore, it was an illegal arrest.

THE COURT: Well, if that is the basis, there is no grounds to it then. The objection will be overruled.

THE DEFENDANT: But I wanted the record to show that the defendant made a motion under the 14th Amendment of the Constitution of the United States for illegal seizure of property, and made a motion to suppress the evidence and also made a motion for the return of his property, which I think is the procedure.

[fol. 230] I don't know whether they follow this particular procedure in California or not, but I think it also holds true that I have to make this motion, also.

THE COURT: Yes. Well, the motion is noted and overruled. The motion is denied.

All right.

(Thereupon at 2:50 P.M. the proceedings in chambers outside the presence of the jury were concluded.)

PROCEEDINGS IN OPEN COURT
2:50 P.M.

THE COURT: Stipulated the jury is all present.

All right, Mr. Murphy.

MR. MURPHY: Mr. Wong, would you resume the stand.

THE CLERK: You have been previously sworn.

ROGER WONG,

having been previously sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Resumed)

Q. (By Mr. Murphy) Mr. Wong, you have already testified that this man had a sport-type coat on; is that correct? A. Yes.

Q. Now, I want to show you a sport coat and ask you whether or not this coat resembles the coat that the man [fol. 231] wore on the occasion of the attempted robbery in your store? A. I think so.

THE COURT: What was your answer?

THE WITNESS: Yes.

THE COURT: "Yes," all right.

MR. MURPHY: May this be marked as People's next in order?

THE COURT: Yes, that would be—

MR. MURPHY: For identification at this time.

THE COURT: Exhibit 20 for identification only.

(Sport coat marked People's Exhibit No. 20 for identification.)

Q. (By Mr. Murphy) Now, you have also testified the man wore a hat; is that correct? A. Yes.

Q. I will show you a dark colored hat and ask you whether or not this hat resembles the hat worn by the man who attempted to rob you on that particular occasion? A. Yes.

MR. MURPHY: May this be marked as People's next in order?

THE COURT: Yes, Exhibit 21 for identification only.

(Dark colored hat was marked People's Exhibit No. 21 for identification.)

Q. (By Mr. Murphy) Now, when you observed at the time in question, the 4th of May, a man come into your store and attempt a robbery, as you testified, did you hap-
[fol. 232] pen to observe the shirt he wore on that occasion? A. Pardon me?

Q. Did you observe the shirt to see what kind of shirt he wore at that time? A. Yes, yellow.

Q. Showing you what appears to be a sport shirt, does that resemble the shirt the man wore on that occasion? A. Yes.

MR. MURPHY: May this be—

THE COURT: The shirt can be marked as Exhibit 22 for identification only.

(Sport shirt was marked People's Exhibit 22 for identification.)

Q. (By Mr. Murphy) Just one other thing, Mr. Wong, after the man left the store, did you make any—notify the police? A. I called the police department.

Q. Was that on the phone? A. Yes.

Q. When you talked on the phone, did you describe the person to the officers on the phone? A. No.

MR. MURPHY: All right, that is all, your Honor.

THE COURT: All right, Mr. Banks, cross-examination.

CROSS-EXAMINATION (Resumed)

Q. (By the defendant) Mr. Wong, are you the owner of Vince's Liquor Store? A. Part owner.

Q. All right. And who are you a partner of? A. Winton.

Q. Who A. Winton Fong.

[fol. 233] Q. And whom all you employ in that liquor store? A. Pardon?

Q. And whom all do you employ in this liquor store? A. Who do I employ?

Q. Yes. A. I got six different boys working for me.

Q. Six different boys working for you? A. All different shifts.

Q. All different shifts, okay. And you have just testified that the man was in your store, and at this particular time he was supposed to have—was holding up your store, and the only recollection, the only remembrance you have of the particular party being in there was when he—when you heard him state, "Do you want to die," is that right, is that the first time? A. "Hurry. Do you want to die?"

Q. Yes. A. "Hurry up."

Q. That was the first time that you had seen this particular defendant in this capacity, that is the first time you had ever seen him in your life; is that right? A. At that time I heard it, that is what he said, and then the boy opened the cash register.

Q. No. Just answer my question. I just want you to answer yes or no. A. Well, say that again. I thought I answered it.

THE COURT: State the question again, Mr. Banks.

[fol. 234] Q. (By the defendant) At this particular time that this person was in your store which was robbing your store, so you say, the only time that you noticed him for the first time in your life was when he said, "Do you want to die"? A. Yes.

Q. Is that right?

THE COURT: Answer audibly.

A. Yes.

Q. (By the defendant) Now, you testified that the

next thing that you did was to look up and at your partner, Jow; is that right? A. I didn't say that.

Q. You said you looked up at your partner Jow over at the other cash register. A. Yes, when I heard you say—

Q. Answer yes or no. A. I don't understand the question. I can't say, yes, and I can't say, no.

THE COURT: State the question again so the witness will have it.

Q. (By the defendant) I asked you when you heard these words, "Do you want to die," did you look at your partner? A. Yes, I look up. I didn't look at my partner; I looked at you.

Q. You seen the defendant. I asked you to answer the question yes or no, just forget me this particular time. [fol. 235] A. Okay, yes.

Q. And you looked at your partner which was at the other cash register, am I right? A. Yes.

Q. That is your statement?

THE COURT: Now, would you answer audibly? A. (Continuing) Yes, yes, yes.

Q. (By the defendant) All right. What was the next think you did after that? A. Well, when I looked up, I saw somebody got a gun on the counter, so I grabbed mine.

Q. You grabbed your gun? A. Yes.

Q. And what was the next thing you did? A. I hit him on the hand.

Q. You hit him on the hand? A. The hand in the pocket.

Q. Yes. Are you sure that you said you hit him on the hand? A. Yes.

Q. You didn't say that you hit him on the arm? A. No. Right here (indicating).

Q. On the hand? A. Right here (indicating).

Q. When the police arrived at your place to investigate this, did you tell any of the officers that you hit the suspect on his hand, or on his arm? A. I think I did.

Q. You think you did? A. Yes.

Q. Now, we want to know for sure. A. Yes, I did.

[fol. 236] Q. Did you tell the officer that you hit the supposed to be robber on his hand? A. Yes.

Q. Not on the arm? Did you tell him also you hit him on his arm? A. No.

Q. Now, incidentally, Mr. Wong, I see that you are wearing glasses, you are wearing glasses now. Were you wearing glasses that particular night? A. I wear glasses all the time.

Q. You wear glasses all the time. Are you sure of that? A. Yes. The only time I don't wear glasses it when I go to bed.

THE DEFENDANT: Your Honor, at this time I would like to see People's Exhibit 9.

THE COURT: You can see them all, they are all right there. You are entitled to look at any of those you want, Mr. Banks.

Q. (By the defendant) Mr. Wong, I would like for you to read this statement here. Read it out loud so the jury can hear you.

MR. MURPHY: Now, I don't think that is correct. I will object to it.

THE COURT: Now, we are going to have to offer it into evidence before the jury can read it.

THE DEFENDANT: Oh.

THE COURT: Now, I don't know what it says, whether you want to offer it or not, but—

[fol. 237] Q. (By the defendant) Have you read that now, Mr. Wong? A. Yes.

Q. Now, I ask you again, did you make the statement to the officer that you hit the defendant on his hand or on his arm? A. In the hand.

Q. In the hand. You then said, "On the hand or arm." A. No, right up here (indicating). I hit once, that's all.

Q. Mr. Wong, you testified on direct testimony that you viewed the suspect the next day. A. Pardon me?

Q. That you viewed the suspect the next day. A. Yes.

Q. At the police headquarters? A. Yes.

Q. For the purpose of identification? A. Pardon me?

Q. For the purpose of identification: is that right? A. Well, the police inspector called me down and said—

Q. I just said, you viewed him the next day for the purpose of identification?

MR. MURPHY: Well, I will object to that as ambiguous as stated.

THE COURT: Well, I think the witness probably has a

different idea of why he viewed him. I think he is going to tell us what it is.

A. The police called me at work and said—

THE DEFENDANT: Wait, your Honor, I object. I was trying to cross-examine the witness to a certain extent.

I wanted him to only answer some of the questions which [fol. 238] I wanted to ask him. I didn't want him to go far afield because there are various points involved here in this point at which he was led to identify the defendant in this particular case.

MR. MURPHY: Well, my objection was that the question as asked was ambiguous and uncertain: He might ask him what his purpose was in going there.

THE COURT: No, he can ask the question of whether he went down there for identification.

Did you go down for identification?

THE WITNESS: Yes.

THE COURT: All right.

Q. (By the defendant) And you was herded into a small room? A. Yes.

Q. At the police headquarters; is that right? A. Yes.

Q. And in this room you was with other people which came down to interview, came down to view the suspect? A. Yes.

Q. Of various crimes, am I right? A. Right.

Q. So in this particular case, who was the first to go to the window in order to view the suspect?

THE COURT: Now, by "first," you mean the first of this group that—

THE DEFENDANT: Yes.

THE COURT: —the witness was present with?

A. Somebody, but I don't know them.

[fol. 239] Q. (By the defendant) Well, how many was with you when you went into this room to view the suspect? A. About four or five, I believe, or more. I don't remember.

Q. And did you, by any chance, hear anyone in that room identify any of the suspects? A. Pardon me?

Q. Did you, by any chance, overhear anyone in this particular room identify any particular suspect? A. No, I just—

Q. No, I asked you—

THE COURT: He has answered the question.

MR. MURPHY: Well, I think the witness has a right to explain his answer.

THE COURT: Well, it doesn't actually need an explanation. He answered he didn't overhear anyone, no.

THE DEFENDANT: That's right.

Q. And did you hear anyone in this room identify the suspect? A. No.

Q. You didn't?

THE COURT: Answer audibly, Mr. Wong.

A. No.

THE COURT: All right.

Q. (By the defendant) And when it came to your turn, did you go to this particular window? A. Yes.

Q. And did you identify a suspect? A. I picked No. 3.

Q. And just what did No. 3 suspect have on? A. At [fol. 240] first, no hat. They all faced the window I am looking at, but they don't see me, you know. So I keep looking them all over to make sure.

Q. And in this particular lineup you did identify a suspect; is that it? A. Yes, I did.

Q. And what did you base this identification on? A. Pardon me?

Q. What did you base this identification on? A. I recognized the face. I never forget when I see someone.

Q. You never forget when you see somebody, it that it? A. Yes.

Q. You didn't use nothing else for identification purposes? A. Well, some clothes.

Q. You didn't use nothing else for identification purposes? A. Well, some clothes.

Q. Oh, you was identifying clothes? A. Clothes and the face.

Q. And the face; is that it? A. Yes.

Q. And in this particular case what did the suspect have on? A. Pardon me?

Q. What did the suspect that you identified have on? A. Have on?

Q. Yes. A. They have got clothes.

Q. What kind of clothes? A. Same kind of clothes.

Q. I want you to describe the clothes. A. Sport [fol. 241] jacket.

Q. What else? A. Kind of yellow shirt.

Q. Yes, and what else? A. At first, that's all I could see, and then I told him to put on the hat.

Q. Do you know the difference between a sport jacket and a sport coat? A. A sport coat and sport jacket same think like this gentleman there have on.

Q. A sport jacket and sport coat is all the same to you; is that it? A. Yes. This is what I call sweater (indicating).

Q. Now, Mr. Wong, I want you to tell me did you identify the suspect without a hat? A. I could, but I wanted to make sure.

Q. No. I said, did you identify him without a hat? A. Yes.

Q. Did you identify the suspect with a hat? A. Yes.

Q. And at that time what type of hat did you say the suspect have one? A. At first, he don't have no hat on in the lineup until I requested.

Q. How many people in that lineup that you viewed had hats? A. That I don't pay much attention to.

Q. Did you see anybody else in the lineup with a hat? A. Yes.

[fol. 242] Q. Other than the suspect? A. Yes.

Q. Let me show you a picture, Mr. Wong. I want you to look at that picture very carefully. A. Yes.

Q. Do you see any other suspect in that lineup there with a hat? A. Right now I don't see any.

Q. But you said awhile ago that you saw other suspects in the lineup with a hat, other than the suspect that you identified. A. Well, I requested him to put on the hat right at the lineup. First, they don't have no hats on in the lineup.

Q. Yes. But you don't see anyone in the lineup now with a hat but the suspect; is that right? A. I don't see anyone but you, but this gentleman got a hat on now.

Q. Mr. Wong, I want to ask you now, did you see any other suspect in that lineup that you looked at that have on a sport coat or sport jacket? A. Do I see—At that time

I don't look for anybody with sport coat, I am looking for the man I am supposed to pick.

Q. I asked you, did you see a suspect in that lineup, other than the one you identified, have on a sport coat or sport jacket? A. I don't remember.

Q. You don't remember? A. No.

Q. Mr. Wong, did you state at the preliminary—

MR. MURPHY: What page?

THE DEFENDANT: Page 14.

[fol. 243] MR. MURPHY: Page 14, all right.

Q. (By the defendant) Mr. Wong, did you state at the preliminary that this man you viewed in the lineup, when you was asked, "Did the suspect wear a hat," you said, "He wear a hat, and he don't wear a hat"? A. In the lineup?

Q. Yes. A. At first, he don't wear a hat in the lineup.

Q. No. I said, did you make that statement on the preliminary? A. I don't quite understand.

THE COURT: Will you show him the statement?

(Defendant hands statement to the witness.)

Q. (By the defendant) Did you make that statement at the preliminary? A. You mean, the first hearing?

THE COURT: Well, now, Mr. Banks, if you are going to use this for impeachment, will you give the page and the line?

THE DEFENDANT: Page 14.

THE COURT: All right, now, will you read it?

THE DEFENDANT: Line 26.

THE COURT: You will have to read the question, too.

THE DEFENDANT: (Reading):

"QUESTION: Actually, did the man in the lineup wear a hat?

"ANSWER: He wear hat, he don't wear hat."

THE WITNESS: Yes, at first he—

THE COURT: Now, the next thing you do is ask, [fol. 244] "Was that question asked and did you give that answer?"

Q. (By the defendant) Was that the exact answer you gave at the preliminary? A. Yes.

Q. And also on Page 15, line 6, it says:

"QUESTION: —"

THE COURT: Now, you have to show it to him first. Show it to him.

(Defendant hands statement to the witness.)

THE COURT: Now, give the page and the line for the record, Mr. Banks.

THE DEFENDANT: Page 15, line 6. (Reading):

"QUESTION: Did anyone else in the lineup have a hat on?

"ANSWER: Sure.

"QUESTION: Did all the men in the lineup wear a hat?

"ANSWER: Some had hats on, some don't have hats."

Q. Were those questions asked and were those answers given? A. Yes.

Q. Were those questions and answers given? A. Yes.

Q. But I showed you a photo of the actual line up as it appeared in the police station. How many people in there did you see had hats?

THE COURT: Now, you are asking him about the photograph or about the lineup?

[fol. 245] THE DEFENDANT: About the lineup.

THE COURT: About the lineup, all right.

A. You have got a hat on, but some of them got hats behind them. They have got their hands behind them.

Q. (By the defendant) I didn't ask you what somebody might have behind them. A. I seen you have a hat.

Q. I asked you, did you see other suspects in the lineup that had a hat? A. Yes.

Q. Now, Mr. Wong, I am going to ask you again, what color was the hat the suspect had on the night you was robbed? A. I told the officer kind of dark color.

Q. Dark color? A. Yes.

Q. You didn't say a brown hat? A. No.

Q. You didn't say blue, by any chance? A. No.

Q. Mr. Wong, on Page 16, lines 3 to 7, I will let you read those. A. (Witness does same.)

Q. Page 16, lines 3 through to 7.

> "THE COURT: I understand from the witness in the case that he does not recognize the hat, he explained that. I think with regard to the hat that he could not give too much identification. Is that right?"

And your answer was:

> "ANSWER: That's right."

A. Right. He asked me what kind of material.

[fol. 246] THE COURT: Now, just a minute.

Was that question asked and was that answer given?

THE WITNESS: Ask that over again. Say that again. I don't quite get it. What did you say again?

THE COURT: Was the question that Mr. Banks read asked of you?

THE WITNESS: Yes.

THE COURT: And did you give that answer?

THE WITNESS: Yes.

THE COURT: All right.

Q. (By the defendant) Is that right, that you don't recognize the hat? A. Yes.

Q. Yet, you still come in this court now and you recognize the hat; is that it? A. Yes. At the time he didn't show me the hat, he asked me what kind of material. How do I know material? A hat is just a hat to me. I just picture the hat out.

Q. All of that derived from wearing a hat, Mr. Wong? A. Pardon me?

THE COURT: I don't understand the question, Mr. Banks. Would you repeat it?

Q. (By the defendant) I say, all of this derived from you indicating that the defendant wore a hat, but you don't recognize it? A. I tell the police it was a dark hat. I don't recognize the whole thing, you know. When I see the hat, I recognize the hat.

[fol. 247] Q. Mr. Wong, you stated that you examined the defendant's hand the next day after you had viewed the suspect in the lineup; is tha right? A. Yes.

Q. And you said you seen a dark spot on the back of the hand; is that right? A. Right, yes.

Q. Did you state or not whether the defendant's hand was swollen? A. I seen a dark spot.

Q. Did you say his hand was swollen? I didn't say anything about a dark spot. A. I didn't say that. I said I seen a dark spot.

Q. In other words, if you hit the defendant on his hand, would his hand have been swollen?

MR. MURPHY: Objection to that as calling for the opinion and conclusion of the witness.

THE COURT: Yes, sustained.

Q. (By the defendant) Mr. Wong, would you say if you hit the defendant's hand that you would make a dark spot like that on the back of his hand? A. I hit it hard enough. Maybe there would be swelling, how would I know?

Q. Was there anything else that you recognized about the defendant's appearance other than just to look at him and say, "I recognize his face, I looked at his clothes, and I recognize his clothes"? A. At that instance, you know, [fol. 248] you don't look at a person like you are judging a beauty contest, you know. You look at a face, and you remember things like that. You don't picture them like in a beauty contest, from the legs on up to the top.

Q. Oh, you just—Mr. Wong, when this robber was in your store and you hit him on the hand, as you say, with your pistol, what else happened after that? A. I told him to "Stick 'em up," and he didn't, he just cussed me out and said, "Go ahead, shoot me."

Q. And a couple of customers, approximately, were in your store at the time? A. About five or six at the time.

Q. What? A. Five or six.

Q. Was any customers between you and the supposed to be robber? A. Pardon me?

Q. Was any customers in between you and the supposed to be robber? A. I don't quite understand.

THE COURT: Were there any customers in between you and the robber?

THE WITNESS: In that instance I don't quite remember, you know. Once I hit this supposed robber, then everybody run when they see the gun.

THE COURT: Everybody run when they see the gun?
THE WITNESS: Yes.
THE COURT: All right.
[fol. 249] Q. (By the defendant) Everybody run when they see your gun? A. I don't mean they run outside, they hide, you know.
Q. Well, how come you didn't shoot the robber? A. When I hit his hand, I didn't hit anything hard and I can't kill nobody without a gun, I'm not that kind.
Q. You can't do what? A. Pardon me?
Q. You can't do what? A. I can't kill anybody unless I hit something hard like metal, then I would shoot.
Q. How come you didn't hold the robber there until the police came? You had a gun. A. Pardon me?
Q. I say, how come you didn't hold the robber there until the police came? You had a gun.
MR. MURPHY: Object to that as argumentative.
THE COURT: He can ask the question.
A. He cussed me out. You kept bawling me out, and, like I say, I can't shoot a guy unarmed.
Q. (By the defendant) You can't shoot a guy? A. No.
Q. What is the purpose of having a gun in the store?
THE COURT: Well—
A. Protection.
Q. (By the defendant) Would you have been within your right in protecting yourself if you shot a robber?
THE COURT: That is immaterial, Mr. Banks, whether he would or not.
[fol. 250] Q. (By the defendant) And, Mr. Wong, was there any other marks or things, appearance about the defendant, which you described, to give you an indication that you used in identification of the defendant? A. Yes.
Q. What were they? A. Well, I think there is a little scar on the left-hand side right here some place (indicating).
MR. MURPHY: Let the record show the witness is indicating the left-hand side of his face just above the left lip.
THE DEFENDANT: Objection, your Honor, to the

District Attorney placing the scar. Let the witness place the scar.

THE COURT: Well, he can indicate where it is.

THE WITNESS: I will say the left-hand side, right here (indicating).

THE COURT: Yes, indicating the left side of the face, I would say, between the lower part of the cheek and the nose, at the base of his nose.

Q. (By the defendant) Now, Mr. Wong, is it true that once before you had tried to place the scar on the defendant's face at the preliminary? A. What do you mean, "place that scar on the defendant's face"?

Q. Yes. A. You mean using my hand motion?

Q. Yes, with your hand, did you attempt to give a design area where the scar was located? A. Same thing that I [fol. 251] did now, left-hand side.

Q. Are you sure that you never indicated that the scar was on the right-hand side of the defendant's face? A. No.

Q. I would like to have you read from line 20 down to line 24.

MR. MURPHY: What page is this?

THE DEFENDANT: Page 8.

(Witness does same.)

Q. (By the defendant) Are you sure that you didn't attempt to place the scar on the right-hand side of the defendant's face?

MR. MURPHY: Now, just a minute.

THE COURT: Mr. Banks, would you read the question?

THE DEFENDANT: I am not reading yet, I am asking him the question, your Honor.

THE COURT: All right.

Q. (By the defendant) After you read this statement, which is in this paper, are you sure now that you didn't attempt to place the scar on the right-hand side of the defendant's face? A. At that time I just showed by hand, my right hand, where the scar is.

Q. But you didn't attempt to place it on the right cheek of your face; is that right? You didn't attempt to indicate that the scar was on the right side of the face? Think

[fol. 252]carefully now. You read that statement. A. Yes, I read that statement. Just like now, I am pointing on this side (indicating).

Q. In other words, now, you are changing it, you are placing it on the left side?

MR. MURPHY: Objection to that as argumentative.

THE COURT: It is argumentative, yes.

Q. (By the defendant) What made you place the scar on the left side of the defendant's face this time?

MR. MURPHY: Objection to that as argumentative. There is no evidence that he ever said it was anywhere else.

THE COURT: There is no evidence of placing it anywhere else, Mr. Banks.

Q. (By the defendant) On Page 8, line 20:

> "MR. SHAUGHNESSY: Q. If I am the robber, and the man you are looking at is me, is it on my left side or my right side?
>
> "ANSWER: This side.
>
> "QUESTION: This is my right side?
>
> "ANSWER: Yes."

Do you recall those questions asked of you at the preliminary, and your answer was, "Yes"? A. The man asked me, "this side."

Q. And you answered, "Yes." A. I said, "Yes."

Q. The right side? A. How do you know that side is [fol. 253] the right side? I meant the robber faced me. I am on this side, he is on that side. It is kind of confusing, you know.

Q. Now, Mr. Wong, we will go back to the statement that you gave the police on the night that you were supposed to have been robbed, concerning hitting the suspect on the right hand or arm. A. Hand.

Q. Do you still want to change that statement? A. No, I am not going to change that. I hit right here (indicating). I know where I hit him.

Q. Mr. Wong, was that the first time your store had ever been robbed? A. Since I worked there, yes.

Q. Had you ever been involved in any robberies before? A. No.

Q. Would you know the reaction of the robber if he

robbed you? What would be his reaction if you pulled a gun on him?

MR. MURPHY: Objection to that as calling for the opinion and conclusion of the witness.

THE COURT: Yes, it is calling for an opinion and conclusion, also speculative. Objection sustained.

Q. (By the defendant) Mr. Wong, what did the robber say when you hit him with the gun? A. As I say, he cussed me out and said, "Go ahead, shoot me."

Q. Did you hear him cuss you out, Mr. Wong? A. If I didn't hear him, I wouldn't say it.

Q. I will ask you to read lines 9 and 10 on Page 11,

MR. MURPHY: What is that line and page number?

THE COURT: Lines 9 and 10, Page 11.

(Witness does same.)

Q. (By the defendant) Now, reading from that statement. First, did you hear the defendant swear at you, Mr. Wong? A. Yes.

Q. After you hit him? A. Yes.

THE DEFENDANT: For the benefit of the record, and the jury, I will read line 9, Page 11.

"QUESTION: Either one.

"ANSWER: When I hit him, I tell him, 'Stick 'em up.' I guess he swear at me."

You say here that you guess he swear at you, but there you say he swear at you. A. You swear at me.

Q. What? A. He swear at me.

Q. What is the difference between you guess then and now you are sure that he swore at you? A. Maybe the guy who typed it typed, "I guess," down.

Q. This is the record of what you said: A. You swear. Not only I heard you, my partner heard you, too.

Q. Was the defendant drunk when he robbed you? A. Pardon?

Q. Was the defendant drunk when he robbed you? A. No, he don't seem to be. He don't seem like he drunk, but [fol. 255] from the way he come in at first, I thought he drunk. But from the way he walks and the way he talks and the way he acts, he don't look drunk to me. With so

many people I don't think anybody would come in to stick me up with five or six people around, but I give him lots of credit.

Q. What was there about him that led you to that idea? A. There were so many people around. Mostly when robber come in, they wait until nobody around.

Q. Mr. Wong, I understand you to say when the defendant left the store—Which way did he go? A. Peralta, go down 13th, that's the way he turned.

Q. Did he go up 16th Street? A. I don't watch him where he go. All I know is he go out and turn that way (indicating).

Q. When you was looking at the picture which the District Attorney gave you a while ago which was a photo outside of your store, didn't you give an indication which way the robber went? A. That is the way he turned, Peralta, turned down 13th, that way (indicating).

Q. The defendant went up Peralta, is that right? A. When I see him go out the door, he turned up Peralta and 13th, that is the way he turned.

Q. I will ask you to read Page 12, lines 9 through 11. A. (Witness does same.)

Q. I ask you once again, Mr. Wong, which way did the robber go when he left your store? A. Still turned up [fol. 256] Peralta, 13th to 16th, that way, that is the same street, you know, 12th, 13th, 14th, 15th, 16th.

Q. I am quoting from the record which was given by you on the stand in the Municipal Court. A. Pardon me?

Q. I am quoting from the record which was given by you. A. That's right.

Q. From the stand in Municipal Court. A. Yes.

Q. Line 9, Page 12: (Reading)

> "Which direction did the man go when he left your store?
>
> "ANSWER: I don't know."

A. The customer watch you, which way you turn, and they tell me.

Q. You say you don't know? A. I don't know, the customer tell me. People tell me he walk out 16th Street

side, I mean 12th Street side, you know, Peralta. Well, Peralta, that is the same side he turned up.

Q. I am not asking you what people tell you, I am asking you, to your knowledge, which way did the robber go when he left your store? A. I busy telephoning police officer, I tell customer, "Watch which way he turn," and the customer tell me which way he turn, but I don't know. The customer tell me, so how do I know? I am busy calling police officer. But 12th Street is the same side as Peralta. When you turn up that way, it is 12th. My store is between 12th and 11th, see, right on the corner. When he [fol. 257] turn that way, it is still 12th and Peralta, 12th, 13th, 14th, 15th.

Q. But the answer was in the Municipal Court you don't know, is that right, Mr. Wong? A. Yes, that's right, I don't know. That's right, the same thing right there. I don't know until the customer tell me which way you turn, which way the robber turn.

Q. I didn't ask you for the opinion of the customers or where they say he went. I am asking you a direct question. A. Well, I say what they tell me.

Q. How many entrances are there to your store? A. One.

Q. If you have only one entrance to your store, how could you frame the statement that "People tell me he walked out 16th Street side. I mean, 12th Street side"? A. You walked that way (indicating). I said you walked up the 12th Street side. I don't have no door on the 12th Street side. You turned that way (indicating).

Q. To refresh your memory, I will let you again read line No. 10, your answer. A. (Witness reads same.)

Q. If your store had only one entrance, the people wouldn't have to tell you which entrance he went out, would they? A. They told me what side you turned, they didn't say what door you go out. What side of the street you turned up. That gentleman asked me (indicating Mr. Shaughnessy).

MR. MURPHY: There are some other witnesses outside.

I wonder at this time if we could have them ordered to

[fol. 258] come back. I don't think we will get to them today.

THE COURT: Yes.

Q. (By the defendant) Mr. Wong, did you ever discuss identification of the defendant with anyone? A. Pardon?

THE COURT: We will take care of this first. Do you want these people back tomorrow morning?

MR. MURPHY: Yes, tomorrow morning.

THE COURT: All right, the witnesses are to report back in this courtroom tomorrow morning at 10:00 o'clock.

MR. MURPHY: Are you going to end at 4:00 or 4:30?

THE COURT: We will go to 4:00 o'clock.

MR. MURPHY: I could keep one of them in case we need him.

THE COURT: All right, you can.

MR. MURPHY: All right, Mr. Young, just wait a few minutes.

THE COURT: All right, the rest of you are excused then to report back tomorrow morning at 10:00 o'clock.

All right, do you want to restate the question?

MR. MURPHY: Thank you, your Honor.

Q. (By the defendant) Mr. Wong, did you discuss identification of the defendant with anyone? A. No.

Q. Before you made that identification? A. No.

Q. Did you discuss it with your clerk that works in your [fol. 259] store? A. He know what he see, I know what I see.

Q. I said, did you discuss it with anyone? A. Nobody else but him, him and me. We both report the same thing to the police officer at the time.

Q. Mr. Wong, I want to ask you, did you identify the defendant as wearing a straw hat on the night that he robbed you? A. Pardon me?

Q. Did you identify the robber, the person that robbed you, having on a straw hat on the night that he robbed you? A. Not that I know. I didn't see no straw hat.

Q. Are you sure? A. I am sure. I just say, "hat."

Q. Mr. Wong, the night the police came to your store after you had reported a robber being up there, did you give them a description of the defendant? A. We both did.

Q. And what was that description? A. Stout, about 50

years old, dark complexion, sport jacket and a shirt kind of yellow.

Q. How much did you say the defendant would weigh in your estimation? A. Oh, about 150, 60 pounds or more.

Q. Did you say, "Dark trousers"? A. Pardon?

Q. Did you say, "Dark trousers, plain shirt?" A. Wait a minute. "Dark trousers"? I don't know if I did or not. Between my partner and me we gave that description.

[fol. 260] Q. Did you say, "plain shirt? A. "Yellow shirt, got flowers on it," I say.

Q. Got flowers on it? A. Some kind of spots, you know, not plain yellow. At that time I just excited.

Q. A sport jacket. Did you give a description that he had on a sport jacket? A. Yes.

Q. Did he have on a hat? A. I don't remember if I gave the description he had a hat or my partner.

Q. Did you or your partner either one give the description that he had a hat on? A. You have to ask him. I answered a little bit, he answered a little bit. We piece it together.

Q. I show you People's Exhibit No.—

THE COURT: It is probably stamped on the back.

Q. (By the defendant) I show you People's Exhibit No. 9 for identification purposes. What I want you to do is read it over on the front. A. (Witness does same.)

Q. Is this the description that you gave the police? A. I may have. That is between me and my partner.

Q. You gave the description that the defendant was 50 years old? A. Yes.

Q. Weighed 150 to 160 pounds? A. Yes.

Q. Stands five feet six inches tall? A. Yes.

Q. Did you know that the defendant you picked out [fol. 261] in the police show-up weighs 180 pounds? A. I am not going to weigh you over.

THE COURT: Now, are you testifying? There is no evidence of what the defendant weighs, Mr. Banks.

(Defendant shows potograph to the Court.)

Q. (By the defendant) I want you to look at that photograph for me. A. (Witness does same.)

Q. Would you still say the person who robbed you was five feet six inches tall? A. Approximately, pretty close.

Q. And did he weigh 150 or 160 pounds? A. Things happen so fast; you know, you just take a quick look.

Q. We don't have no explanation to the jury. A. Yes, I still say that.

Q. Weighed 150— A. To 160 pounds, yes, approximately.

THE COURT: We will recess at this time until tomorrow at 10:00 a.m.

I will again admonish the jury not to discuss the case among themselves or with anyone else or to form or express an opinion at this time. See you in the morning.

(Whereupon, at 4:00 o'clock p.m. a recess was taken to reconvene on Wednesday, August 1, 1962 at 10:00 o'clock a.m.)

[fol. 262]

WEDNESDAY, AUGUST 1, 1962, 10:00 O'CLOCK A.M.

PROCEEDINGS IN CHAMBERS OUTSIDE THE PRESENCE OF THE JURY — 10:00 O'CLOCK A.M.

THE COURT: We are in chambers. Mr. Banks, the defendant, is present, Mr. Shaughnessy, Mr. Murphy, the clerk, reporter, bailiff.

MR. MURPHY: Yesterday the defendant asked for any notes or records made at the time the victims called in to the Police Department reporting the offenses.

Now, I have obtained from the Police Department radio room, first of all, a photostat of the record of the calls in and the time the call was broadcast.

Now, it requires a little bit of interpretation because they use this decimal time on some of the calls.

THE COURT: Mr. Banks wants the sheets.

MR. MURPHY: Yes. Now, down at the radio room I had them type in the explanation of the translation from decimal time where it appears to regular time.

And if he wanted somebody to come down, I suppose that we could find out who would do it.

Also, I have here a time clock conversion table from which you could translate from the decimal time to the actual time.

[fol. 263] THE COURT: You are talking about decimal time?

MR. MURPHY: It is the time they use in making these broadcasts, for example, 2377, which is not an understandable time, so you are able to translate it.

THE COURT: I see. Yes, all right.

MR. MURPHY: I hand that also to the defendant.

Now, in addition to that photostat of the time the calls came in, there are also two photostats of reports on these three offenses with descriptions of the responses.

Now, I hand these accounts of the three offenses to the defendant. The information on there is obtained by the police officer after he goes to the scene and talks to the victims, and then he calls that back in to the radio room and they put that out on the air.

In other words, that is not information received from the victim over the radio.

THE COURT: All right.

MR. MURPHY: And may the record show that I am showing the defendant also two separate sheets containing reports on the three offenses involved in this case.

THE COURT: That is all you have, Mr. Murphy?

MR. MURPHY: That is all I have.

THE COURT: All right, Mr. Banks.

THE DEFENDANT: Your Honor, one of my witnesses appeared outside there, and I would like to interview her before court begins.

[fol. 264] THE COURT: All right.

THE DEFENDANT: And I would like for you also to make a notation, you know, notify her when she has to come back and appear.

THE COURT: You will have to tell me that, and then I can instruct her.

THE DEFENDANT: And since identification is playing an important part in this, I would like to know if this Court could have the District Attorney give me a photograph of a close-up picture which was taken of me over in the Police Department files which is a close-up view of the facial picture which is taken.

THE COURT: Full face?
THE DEFENDANT: Yes.
THE COURT: Do you have that, Mr. Murphy?
MR. MURPHY: I believe I do, "5 May, '62."
THE COURT: That is full face and profile?
MR. MURPHY: Yes.

(Hands picture to defendant.)

THE COURT: Is that what you are referring to, Mr. Banks?
THE DEFENDANT: Yes, thank you.
THE COURT: The record will show that the photographs were delivered to Mr. Banks.
All right, anything else?
THE DEFENDANT: No, that is all, Your Honor.
THE COURT: All right, as soon as you are finished, we will call the jury down and get under way.
[fol. 265] THE DEFENDANT: All right, thank you.

(Whereupon, at 10:15 A.M., the proceedings in chambers outside the presence of the jury were concluded.)

PROCEEDINGS IN OPEN COURT IN THE PRESENCE OF THE JURY — 10:20 A.M.

THE COURT: The jury is all present.
All right, Mr. Banks, you want the witness ordered back for 10:00 o'clock tomorrow?
THE DEFENDANT: Yes.
THE COURT: All right, where is the witness?
THE DEFENDANT: Mrs. Cunningham is here.
THE COURT: All right, Mrs. Cunningham, you are excused now to report back in the courtroom at 10:00 A.M. tomorrow morning.
All right, we are on the cross-examination of Mr. Wong.
Mr. Wong, will you take the witness stand. The Court will remind you you are still under oath.
All right, Mr. Banks.

ROGER WONG,

being previously duly sworn, resumed the stand and testified further as follows:

[fol. 266]

CROSS-EXAMINATION (Resumed)

Q. (By the defendant) Mr. Wong, since you left the courtroom yesterday, have you read any transcript of your statement that you made at the preliminary since yesterday? A. You mean, after I left here?

Q. Yes. A. No.

Q. Have you been coached in any way concerning the record since you left here yesterday? A. I can't hear you. What did you say?

Q. Have you been coached in any way by the State's Attorney, the inspector, in reference to any remarks that you may have made or any statements that you may have made during the preliminary after you left here yesterday? A. I don't quite get that.

Q. Mr. Wong, have you had an opportunity to read the transcript that was made at the preliminary of your conversation? A. No.

Q. Mr. Wong, what type of shirt did the robber have on the night that you was robbed? A. At that time it was yellow, and I think it had a little flower on it. I was so excited at that time.

Q. You think it had a little flower on it? A. Yes, it was yellow.

Q. Are you sure it had a flower on it or not? A. At that time I think it had a flower on it.

Q. It may have had a flower, but you are not sure, [fol. 267] you are not positive it had flowers on it? A. No, it happened so fast, you don't recognize it. The newspapers say when a person rob you, you should watch the person that rob you, their face, their clothes. A while back the Oakland Tribune said that. I think that is the most important thing.

Q. Mr. Wong, what type of trousers did the robber wear that night? A. I didn't pay much attention.

Q. What color were they? A. Because the counter is so high, my checking counter, when I look, I see halfway down, that's all. Like I say, I don't judge people by looking the whole thing over, you know.

Q. Mr. Wong, yesterday I asked you did you give a description to the police of the robber. A. Between me and my partner.

Q. Between you and your partner? A. Yes.

Q. And what description did you give to the police between you and your partner?

MR. MURPHY: Object to this as being asked and answered. It was gone into at length yesterday.

THE COURT: Well, we have the material that you delivered to the defendant this morning that he can cross-examine on.

MR. MURPHY: All right, very well.

Q. (By the defendant) What description did you give to the police at the time they arrived at your place [fol. 268] that night of the robbery? A. About 160, 150 pounds, five foot six, stout.

Q. What kind of shirt was he wearing? A. Well, at that time I think my partner gave—All I know is yellow, but what kind of material, I don't know, see.

Q. What kind of pants did you say he was wearing? A. I didn't say that, maybe my partner did.

Q. What kind of jacket did you say he was wearing? A. Dark color, that's all I say. The robber faced him more than he faced me.

Q. The night that you—that this occurred, Mr. Wong, did the defendant, did the robber appear to you to be drunk?

MR. MURPHY: I will object to this as being asked and answered, gone into yesterday.

THE COURT: Well, it wasn't too clear what the situation was on it, Mr. Murphy, so Mr. Banks can go into it again.

A. At first, I didn't think the robber drunk. After a while, afterwards, I think about it, you know, and with so many customers around, so many people there, I say he must be crazy or drunk or something. I make that remark, you know. I said, "He has a lot of courage to come in with five or six people around."

Q. I asked you did it appear to you that— A. No.

Q. He didn't appear drunk to you? A. No; not drunk to me, not since he cussed me out and told me shoot him and walked pretty good, run pretty good.

Q. Mr. Wong, I am going to ask you at this time to [fol. 269] read from the transcript that was made at the preliminary at the Municipal Court, Department 5, before Hon. Judge Charles E. Fisher, and ask if the questions were asked of you at that particular time which was on page 4 in line 24.

THE COURT: Now, Mr. Banks, when you give him the line, that is the starting line.

Now, how far do you want him to read?

THE DEFENDANT: I just want him to read line 24, that's all.

(Witness does same.)

THE COURT: Now, is this to refresh his recollection or for impeachment?

THE DEFENDANT: Yes, just to refresh his recollection.

THE COURT: All right.

Q. (By the defendant) When you was asked at that time by the District Attorney in the Municipal Court, on page 4, line 22, the District Attorney at that time asked you:

"Question. Then what occurred after he said, 'Go ahead and shoot'?"

And your answer was:

"Answer. So I figure maybe he is drunk."

A. That's right. I answered like that.

Q. Is that your answer? A. Yes. Nobody tell me to shoot him, unless something wrong, goofy.

Q. But you said now that the defendant appeared to you not to be drunk?

[fol. 270] MR. MURPHY: I will object to that as argumentative, Your Honor. He has already explained to the Court.

THE COURT: This is argumentative, yes.

Mr. Banks, I believe the testimony was he did not ap-

pear to be drunk, but the witness's reasoning processes were that he must have been drunk to try a robbery with all the customers present.

THE WITNESS: That is what I mean.

Q. (By the defendant) Now, Mr. Wong, let's get back to the hat. I will ask you again, Mr. Wong, how many people were in the line-up? A. Five or six.

Q. That had hats on? A. Five or six of them.

Q. Five or six of them in the line-up had hats on? A. No, I didn't say they had hats on. You asked me how many people were in the line-up, and I said, "Five or six."

Q. Now, how many in the line-up had hats on? A. I don't remember. Things like that, I don't remember. They said, "Pick the person out," they didn't tell me how many persons, though.

Q. You are sure, Mr. Wong, that you haven't seen or read a copy of the transcript since you left here last night? A. Honestly.

Q. Mr. Wong, when you went into the room to view the suspect, which you was called down to make an identification of the defendant, how many people was in that group? A. Five. I think four or five of them.

Q. Four or five? A. Yes, maybe more.

[fol. 271] Q. Maybe more. Well, how many people in that group besides you and the inspector? A. How many people in that group in that room besides me?

Q. And the inspector? A. About four or five, I think.

Q. About four or five? A. Yes. I don't count them. I minded my business, you know, what I am supposed to do.

Q. And was you the first to step up to this rear view window? A. No.

Q. And just what number did you step up to this window to view the suspect? A. Either No. 2 or No. 3, I don't remember what number I stepped up.

Q. Either No. 2 or No. 3? A. Yes, I don't remember what turn is my turn, you know.

Q. Could it have been either No. 3 or No. 4? A. I don't remember. When the inspector tell me to come, I come. I don't count.

Q. But have you ever made the statement that you was either No. 4, No. 3 or No. 4 to step up to the viewing window? A. Who mentioned it?

Q. I say, have you ever made that statement? A. I don't remember, myself. If I do, I don't remember. That kind of question is not important to me.

Q. Again, I will read the transcript to refresh your memory. Reading from page 18 of the transcript of the [fol. 272] Municipal Court before Hon. Judge Fisher, Department 5, page 18, and lines 12 and 13.

(Witness does same.)

Q. It was asked of you at that time by counsel on cross-examination:

"Question. Do you know what number you stepped up to the window as?

"Answer. Three or four."

A. And why don't you say "I don't remember"?

Q. "I don't remember."? A. I have got, "I don't remember" in the back of the line, too.

Q. Mr. Wong, did the robber on the night that he came into your store, did he have a beard? A. A what?

Q. A beard. A. A beard? No. You mean a beard like this (indicating)?

Q. A beard on the lower part of the lip or chin? A. I don't think so. He had a mustache.

Q. He had a mustache. Are you sure that he didn't have a beard?

MR. MURPHY: Well, just a minute, I am going to object to the word "beard" as ambiguous as stated by the defendant.

I think he should describe what he means, just a little bit of hair or a big beard.

THE COURT: All right.

THE DEFENDANT: I will rephrase that, your Honor.

Q. Mr. Wong, did the robber, on this particular night, have any hair on the lower part of his lip, either on the lower lip—

[fol. 273] THE COURT: Or chin; including the chin?

THE DEFENDANT: Yes.

THE WITNESS: Right here, you mean (indicating)?

I didn't see anything there.

THE COURT: All right.

THE DEFENDANT: Your Honor, I would like to have this marked for identification purposes.

THE COURT: Yes. All right. The photograph will be marked as Defendant's Exhibit "A" for identification.

(Thereupon, photograph was marked as Defendant's Exhibit "A" for identification.)

THE CLERK: Do you want to refer to it, Mr. Banks?

THE DEFENDANT: Yes.

Q. Mr. Wong, at this time I will show you a picture which was taken the next day, of the Defendant here in this case, which shows that he has a beard and he also has hair—

MR. MURPHY: Object to that as—

THE COURT: What the picture shows, Mr. Banks, if you are going to go into that, you will have to offer it into evidence.

THE DEFENDANT: All right. I will offer it into evidence.

THE COURT: All right. This is a picture of the Defendant taken on May the 5th.

MR. MURPHY: It is dated May the 5th on the picture.

THE COURT: May 5, 1962.

All right, then, Exhibit "A" will be in evidence.

(Thereupon, photograph previously marked Defend-
[fol. 274] ant's Exhibit "A" for identification was received in evidence.)

THE COURT: Now, do you want to ask him a question?

Q. (By the Defendant) Do you see the Defendant here has hair on his—

THE COURT: Counsel, whether he—

THE WITNESS: Your Honor just asked me if I meant "here"—(indicating). You see me point over here (indicating).

THE DEFENDANT: May I pass this to the jury?
THE COURT: Yes, you can pass that to the jury.

(Defendant exhibits photograph to the jury.)

Q. (By the Defendant) Mr. Wong, have you—
THE COURT: Now, Mr. Banks, would you just wait until the jury finishes looking at the pictures, so their attention will not be divided?
THE DEFENDANT: All right.
THE COURT: All right, Mr. Banks.
Q. (By the Defendant) Mr. Wong, when you were summoned to the police headquarters to view the suspect, which you had been informed by the police that they wanted to see if you could identify anybody, were you told in advance that they had a suspect that they wanted you to identify? A. Well, they phoned me, told me to come down to see if I could pick out a suspect.
Q. You weren't told that they had a suspect which they believed had committed these robberies, and they wanted you to view him? A. Yes, they told me they have got a suspect. They tell me to pick out one, to see if it [fol. 275] is the right one, and make sure it is the right one, and I don't want to pick out the wrong guy, I have got to live with my conscience.
Q. So, with that in mind, you came down to the police headquarters to pick out a suspect.
Did you have occasion to be told by any of the police department or the inspectors that the suspect would be in this lineup? A. They said—They tell me, they said, "There are quite a few people in there, a different bunch we can bring in," that if I couldn't pick out the one in the same lineup, to pick the next bunch.
So I have to study very hard to pick the right person. Like I say, I don't want to pick the wrong guy. I study awfully hard and take a long time to look.
Q. Mr. Wong, how many lineups did you go to that day? A. I go to one lineup. The first one I pick out the suspect. The police officer says maybe they will have a couple of them.
Q. Mr. Wong, you weren't showed any other lineup that particular day; is that right? A. Just that one.

Q. Just that one particular lineup? A. Yes.

Q. So on this particular day, Mr. Wong, you came down with a man to pick out the suspect in this lineup with a sport coat on; is that right? A. Pardon me?

Q. With a sport coat on; is that right?

THE COURT: I didn't get the last couple of words.

[fol. 276] Q. (By the Defendant) With a sport coat on. A. Sport coat or jacket, same thing like everybody wears.

Q. So when you were shown this lineup, how many of the people appearing in that lineup had on a sport coat? A. I don't know. I studied the face the most, I don't go by the clothes any more. The face is the most important thing.

Q. How many people in that lineup had a scar on their face? A. None that I know of. I studied one at a time.

Q. How many people in the lineup had a— A. I didn't say how many; I didn't answer how many. I just studied the one I am supposed to pick. If I don't pick out the one, I don't look the second time.

Q. How many people in that lineup that had beards? A. Oh, brother!

Q. Or mustaches? A. I don't remember. I am supposed to pick the right one, I am not supposed to study everyone of them.

Q. How many people in that lineup appeared to you to be 50 years old? A. I don't remember. It has been three months already.

Q. If there hadn't been anyone in the lineup with a sport coat on, could you have made an identification?

MR. MURPHY: I will object to that as speculative, your Honor.

THE COURT: No, he can answer it.

Do you understand the question?

[fol. 277] THE WITNESS: What is "focal"? You mean the glasses?

THE COURT: State the question again for him.

Mr. Reporter, read the question.

(Question read.)

THE COURT: Now, for clarification, you mean the same persons in the lineup, but none of them wearing a coat, a sport coat?

THE DEFENDANT: Yes.

A. Well, I studied the face like I told you, your Honor.

Q. (By the Defendant) Mr. Wong, I would like to have you answer "Yes" or "No." A. Yes. Without the sport coat, I still could recognize a person.

Q. How many times have you been shown a picture of the Defendant? A. I see you once, I see the picture you just shown me, and yesterday.

Q. You have never seen a picture, other than those two? A. Nobody showed me, unless you give it to me. You showed me yesterday.

Q. Mr. Wong, when you made your identification to Inspector Zweigle, of this Defendant, did you tell him about the face scar and mustache which the Defendant had at that time? A. When I looked through the door, maybe I did, I don't remember; but I do pick you out. He didn't ask me. I don't think he did. He just tell me to pick out the right one and be pretty sure, that's all. [fol. 278] Q. Mr. Wong, the night that you reported this crime to the police and the police came out to your place, did you say anything to the police about a scar or beard which the Defendant—which the robber was supposed to have had on? A. Like I say before, my partner and me together give the police officer the description. Either I say it or he say it, I don't remember. They ask both of us questions and we both gave a little bit description at that time, you know.

Q. Do you recollect the calling that you reported to the police? A. I called the police, yes.

Q. That the robber had a scar on his face? A. I don't know if I told him or not, I don't remember.

Q. Did you report to him that the robber had a mustache. A. I don't know. Maybe my partner say that, or maybe I say that. I still don't remember. Two heads are better than one head, you know. He see you better than I see you. You face him more.

Q. Mr. Wong, when did you first notice that the robber had a scar on his face? A. That night when you turned and cussed me out. I hit him in the hand, and

he backed out, backed a few steps back, and then, you know, I take a long look.

Q. Mr. Wong,—

MR. MURPHY: The witness wasn't finished with his answer.

THE COURT: Yes, he can finish his answer.

A. (Continuing) When I hit the hand and he back up a little bit, and then I take a look. I tell him, "Stick [fol. 279] 'em up," and he cussed me out, and I took a look at him.

You know, when people get robbed, you get excited. I don't know if you people ever get robbed before or not, but I did, and I got plenty excited.

THE COURT: All right. I think he has answered the question.

Q. (By the Defendant). How many times have you been robbed, Mr. Wong? A. First time.

Q. First time? A. My first experience.

Q. Mr. Wong, which was the first time you noticed that the Defendant had a mustache? A. That same night.

Q. Can you recall if you have ever reported to the police or State's Attorney that the Defendant or the robber had a mustache? A. Did I report to the State's Attorney or the police?

Q. Or the police. A. Maybe I did, or my partner did; I don't know. Either one of us did. Like I tell you, the two of us did.

Q. But you, yourself, can you recall whether you ever reported this to the police? A. At that time I didn't remember.

Q. Or the District Attorney? A. I tell the police, or he tell the police. See, I am not myself alone in the store. You see, there are two of us.

Q. That the robber had a beard or a scar? A. If I didn't say it, he said it.

Q. Mr. Wong, if I was to tell you that you had never [fol. 280] reported it to the police—

MR. MURPHY: Object to that. Counsel cannot testify himself. It is an improper question.

THE COURT: Well, the objection is a good objec-

tion. I don't know if he is going to testify or not, but go ahead and state the question, Mr. Banks.

THE DEFENDANT: I object to the District Attorney objecting to the question in that form, your Honor.

THE COURT: The form is all right. Go ahead and state your question now.

Q. (By the Defendant) Mr. Wong, I say that you have never reported to the police— A. I still say—

THE COURT: Now, just a minute.

Mr. Banks, are you testifying or are you acting as counsel now?

THE DEFENDANT: No, I am acting as counsel.

THE COURT: Well, it is quite immaterial then what you say.

Now, you can ask him whether he had ever reported it to the police.

Q. (By the Defendant) Mr. Wong, when was the first time that you had a conversation or it was brought to your attention about a scar or beard?

THE COURT: Now, you have two questions; one, when did you first have a conversation, and, two, when was it first brought to your attention.

THE DEFENDANT: Yes.

[fol. 281] Q. When was it first brought to your attention by discussion that the robber had a scar on his face? A. Right after the robber left—left the store.

Q. You had a discussion— A. With my partner.

Q. —with whom, your partner? A. Yes.

Q. Did you have a discussion there with the police? A. The police didn't come yet at that time.

Q. When the police came, did you have a discussion? A. Well, they asked questions and I answered them.

Q. What did you tell the police at that time? A. About what, a scar?

Q. A scar. A. I don't remember whether I did or did not.

THE DEFENDANT: Your Honor, I was wondering if the People's Exhibits are still in the Courtroom?

THE COURT: Yes.

THE DEFENDANT: I would like to look through them.

THE COURT: Very well.

Q. (By the Defendant) Mr. Wong, I would like for you to read from the police officer's field sheet, which is dated May 4, 1962, time 2300. This is made by one of the officers, made by an officer which appeared at your store in response to your call, and this is the statement—

THE COURT: Now, you are not going to read it?

THE DEFENDANT: No, I want him to read it.

THE COURT: Just point out to him what you want him to read.

[fol. 282] THE DEFENDANT: This is a statement which you made to him.

THE COURT: Now, you are testifying. Just ask him what you want read. Point out what you want him to read.

Q. (By the Defendant) I would like you to read from —start on this side over here and read the entire statement.

(Witness does same.)

A. I read that yesterday.

THE COURT: Just a minute. There is no question now.

Q. (By the Defendant) Mr. Wong, did you see any remarks on that report about a scar or a beard?

THE COURT: Now, Mr. Banks,—

A. That report I give—

THE COURT: Just a minute. Just a minute.

That report is not in evidence, Mr. Banks, so whether he saw it on there or not would not be material at this point.

I don't know if you want the whole report in or not, but you had better talk to Mr. Shaughnessy about how far you want to go in mentioning it.

I don't know what the report says, I haven't even looked at it.

THE DEFENDANT: All right. May I ask for a ten-minute recess?

THE COURT: Yes. We will take the morning recess at this time.

I will again admonish the jury not to discuss the case or form any opinion at this time.

[fol. 283] Mr. Shaughnessy would be available to the Defendant then, if he wants to consult with him.

(Morning recess taken.)

THE COURT: All right. Stipulated the jury is all present?

MR. MURPHY: Before we resume, your Honor, there are some witnesses we won't get to this morning, possibly not today.

I will ask that Mr. Perry be ordered to return at 2:00 p.m. today.

THE COURT: All right, Mr. Perry, you are excused now to report back in this Courtroom at 2:00 p.m. today.

MR. MURPHY: And Mr. Griffith, I will ask that he be ordered to return at 10:00 o'clock tomorrow morning.

THE COURT: Mr. Griffith, you are excused and are to report back at 10:00 a.m. tomorrow morning.

MR. MURPHY: And Mr. Slaise, I ask that he be ordered to return tomorrow afternoon at 1:30.

THE COURT: All right, Mr. Slaise, you are excused now to return tomorrow at 1:30 p.m.

MR. MURPHY: Thank you, your Honor.

THE COURT: All right, Mr. Banks.

Q. (By the Defendant) Mr. Wong, on the night that the robber was in your store and he left your store, which way did he run?

MR. MURPHY: Object to this as asked and answered.

THE COURT: Well, this is cross-examination. He can go into it once more.

THE WITNESS: He go out the door, turn left, go [fol. 284] down Peralta and 13th, that way, (indicating) 12th, 13th, that way (indicating).

Q. (By the Defendant) Did the robber run or walk? A. He walk out the store, but as soon as he walk out, I don't know.

Q. You don't know whether he run or not? A. Not after he was out. I am busy on the telephone.

Q. Now, that I might refresh your memory, Mr. Wong, I would like for you to read this statement here,

which was taken at the time of your cross-examination in Department 5 of the Municipal Court.

I would like for you to read Page 11, Lines 15 to 19.

(Witness does same.)

Q. (By the Defendant) When questioned on cross-examination in the Municipal Court, did you make the following reply in answer to the above statement, which was asked of you by examining counsel, on cross-examination at the Municipal Court? Line 15:

"Question: What was there about him that led you to that idea?

"Answer: Usually a robber, they rob you. When you pull a gun and hit them, they run, but this one didn't, he walked out of the store and then he run."

A. Yes, you must be running after you walk out of the store.

Q. But a minute ago, when I asked you, "Which way did the robber run"— A. I didn't say which way, I said you turned left, you walked out of the store, and [fol. 285] after you walk out of the store, I don't know whether you run or not.

You must be running, that is what I say. I didn't say you run.

Q. Here you say, "You run." A. I didn't say, "You run," did I?

Q. That is your answer. A. Now, I say you walk out of the store and turn left and you must be running.

Q. That was your answer to the question. A. What did you say?

Q. ". . . then he run." A. Must be. After he get out of the store, he not going to take his time and walk, I don't think.

Q. Well, did you see him running? A. I didn't. I said, "must be." The paper said, "must be running." They have got it down there that way. "Must be running," it looks like, I suppose.

Q. Mr. Wong, do you recall on May 4, 1962, do you recall talking to Officer Ticksman? A. They have quite a few police officers come in. I don't know which one I talk to.

Q. And at this time you gave him a statement? A. Either me or him, either one of us.

Q. Now, this happened on the night of the robbery that you talked to Mr. Ticksman on May 4, 1962. A Who is he? You mean the police officer?

[fol. 286] Q. Yes, when he came to your place. A. We both talked to quite a few of them.

Q. And at this particular time, did you tell the police officer that you heard the robber say, "Give me the money"? A. "Give me the money. Do you want to die?"

And my partner say, "All the money?"

I heard that.

Q. Did you tell him on hearing this, "I reached under the counter"? A. I did.

Q. "And picked up my gun"? A. Yes, I reached under the counter, picked up my gun, and I hit him. I should have shot him.

Q. And you struck him on the hand or arm? A. I didn't say "the arm." The hand.

THE DEFENDANT: Your Honor, I would like to get some advice from the Court.

THE COURT: Yes.

THE DEFENDANT: Do you think the proper foundation has been laid for impeachment, if I called this officer later on in the trial?

THE COURT: Yes, you can call the officer.

THE DEFENDANT: Thank you.

Q. Mr. Wong, I would like to refresh your memory with a picture of the lineup that was taken.

MR. MURPHY: I will object to this at this point. There is no question before the witness that I know of to [fol. 287] refresh his memory about.

THE COURT: Well, I don't know what you are going to do, Mr. Banks, but let's take it a step at a time and see if we can work it out.

Q. (By the Defendant) Mr. Wong, how many people in the lineup that didn't have a sport coat on? A. I told you a while ago, I don't remember. I studied faces.

Q. In order to refresh your memory, I will show you a picture which was taken of that lineup. A. I don't care how many times you refresh my memory, I just picked the right guy, that's all.

(Defendant hands photograph to witness.)

MR. MURPHY: May the picture be marked for identification?

THE COURT: Yes, it will be marked Defendant's Exhibit "B" for identification only.

(Thereupon, photograph of lineup was marked as Defendant's Exhibit "B" for identification.)

Q. (By the Defendant) Mr. Wong, how many young people do you see in that picture? A. I studied them one by one, none of them fit the description except the one I picked. If probably at the first lineup I didn't pick one, I would still say I didn't find the right one until they bring me some more. If I pick the right one, then there is no use to bring me any more to pick.

THE COURT: Now, Mr. Wong, the question is: How many young people?

[fol. 288] Now, the question is indefinite, Mr. Banks. What is a "young person"?

Generally, it is defined as a person who is younger than I am, but, otherwise, it is a little difficult to define, so if you will—

Q. (By the Defendant) Mr. Wong, how many people in the picture appear to you to be young? A. Younger than you are?

Q. Younger than 50 years old. A. At the time of the first lineup, I mean, at the lineup, I checked, I looked. None of them fit the description but one of them.

THE COURT: Now, how many appeared to be under 50?

THE WITNESS: Even though I just seen the picture, I don't remember.

Q. (By the Defendant) How many did you say?

THE COURT: He said he doesn't remember.

Q. (By the Defendant) Mr. Wong, from your statement that you made during the course of this cross-examination, was it possible that you have picked anybody else out of that lineup other than the Defendant? A. Are you kidding? I live with my conscience. No, I don't want to pick nobody out unless I am positive.

Q. Age played an important factor in picking a person out of a lineup when it was only one or two people in there which appeared to be about the age of 50 in that lineup.

MR. MURPHY: Object to that as an improper ques-
[fol. 289] tion and testimony by the Defendant.

THE COURT: Yes, it assumes facts not in evidence.

The subject matter is not improper, Mr. Banks, but the form of the question is.

Q. (By the Defendant) How many people appear in that photograph, in your opinion, to be close to 50? A. Let me look again, let me look at the picture again.

THE DEFENDANT: Could I get the Court Reporter to read that? A. I would have to see the picture before I can tell you.

THE COURT: He wants to see the picture, so he can look at it. A. You asked me how many appeared close to 50, so I have to see the picture before I can tell you, otherwise I can't tell you.

(Defendant hands photograph to the witness.)

A. Besides the robber, one is close to 50, the other about 30-something, and there is two of them kind of young.

Q. (By the Defendant) So, then, Mr. Wong, it was impossible for you to pick anyone out close to 50 other than the Defendant in this particular lineup; is that right?

MR. MURPHY: Object to that as argumentative.

THE COURT: Yes, it is argumentative.

THE WITNESS: What did you say, again?

THE COURT: There is no question.

THE WITNESS: Oh.

Q. (By the Defendant) You say only one appeared, [fol. 290] from the picture, to be close to 50? A. I said, one more, too, besides the robber, the one standing next to the wall there, close to it.

Q. So, from this deduction, that only left three people in the lineup for you to pick from, am I right? A. If I didn't pick from the lineup—

THE COURT: I don't understand the question, Mr. Banks.

Q. (By the Defendant) Mr. Wong, if two people in the picture, in the lineup, are too young to fit the description, then you would have to exclude them from the lineup? A. Well,—

MR. MURPHY: Object to that as argumentative.

THE COURT: Well, he can answer it.

A. Well, if those two older men is not the one I am looking for, I still say, "That is not the man," and I will look until it is the right man. I don't just pick out anybody 50 years old, you know. That is not right.

Q. Were these two people in the lineup, did they have on a sport coat or sport jacket? A. I didn't study too much about sport coats or about sport jackets. I studied the face more.

Q. Did they have any scars on their face? A. The other one, I didn't pay too much attention to. I just looked at the guy I am supposed to be looking at.

Q. And who were you supposed to look at? A. Look at the one who robbed the store.

[fol. 291] Q. You were supposed to look at five men. A. Well, I picked the right one. I picked the one I am supposed to pick.

Q. Mr. Wong, the description you gave of the man that robbed your store, he was five feet six; am I right? A. Yes. Between my partner and me, we both give the description.

Q. Five foot six? A. Close to it. I didn't measure the robber, you know.

Q. He weighed 150 pounds; is that right? A. Close to that, 150, 160 pounds.

Q. One fifty or one sixty pounds? A. He didn't wait for me to weigh him.

Q. In your opinion, how tall would you say the Defendant was that you picked out from the lineup? A. Pardon me?

Q. Yes. A. I can't hear you.

THE COURT: Repeat the question.

The Reporter will read the question.

(Question read.)

THE WITNESS: I still think he is five feet six or seven, from my side of the counter.

Q. (By the Defendant) And how much would you say the fellow you picked out of the lineup would you estimate to weigh? A. To me, still 150, 160 pounds.

Q. This person that you picked out of the lineup, did he wear a tie? A. Pardon me?

[fol. 292] Q. A tie. A. I don't remember. At that time, like I told you, I studied the head, the face.

Q. Did he have his shirt open? A. Pardon me?

Q. Was his shirt open at the collar? A. I don't remember whether he got his shirt open or not. The inspector didn't ask me those things. I was supposed to pick a person out, not to remember a thing like that.

THE COURT: You have answered the question, Mr. Wong.

Q. (By the Defendant) Mr. Wong, did this robber have a tie on? A. When?

THE COURT: When, at the time of the robbery or the time of the lineup? When?

THE DEFENDANT: I asked him, did this robber have a tie on. He said he was robbed, so I asked him if this robber had a tie on.

THE COURT: You are referring to the time of the robbery?

THE DEFENDANT: Yes.

THE WITNESS: My partner, you ask my partner. I looked at the face pretty close. I was excited, you know.

Q. (By the Defendant) Was his shirt open? A. I don't remember.

Q. Now, Mr. Wong, how many pair of glasses do you have? A. I wear the same glasses for the last couple of years at least.

Q. I asked you how many pairs do you have? A. I have got sunglasses, my reserve glasses, and my all day [fol. 293] glasses.

Q. Are these glasses, they are for definite occasions? A. Nope. They make me feel better. In fact, for my driver's license, I don't need no glasses for my driver's license.

Q. Mr. Wong, were you in the Courtroom during the picking of the jury? A. Pardon me?

Q. Were you in the Courtroom during the picking of the jury? A. No. You mean, at first?

Q. Yes. A. Yes, I stayed for a little bit.

Q. You were in the Courtroom all day yesterday? A. I am waiting outside.

Q. Is that right? A. Until they called me to come in.

Q. You was in the Courtroom all day yesterday afternoon, with the exception of the recess; is that right? A. Not all day. When they called me to come in, it must have been in the afternoon.

THE COURT: Yesterday afternoon.

THE WITNESS: Yesterday afternoon, until 4:00 o'clock.

Q. (By the Defendant) Mr. Wong, could you identify the robber if he were without coat, hat and shirt? A. Sure, I recognize him. Like I say, I study by the face. Clothes, they can always change them after they get out of the house, the store. The face, they couldn't change.

Q. How many people that were in the lineup had on [fol. 294] a vest? A. Had on a vest?

Q. A vest. A. What is a vest?

Q. A jacket without sleeves or collar. A. I didn't pay too much attention to it.

Q. In order to refresh your memory, I show you this photograph again.

MR. MURPHY: Defendant's "B," your Honor.

THE COURT: What is that?

MR. MURPHY: Defendant's "B."

A. I say, I still studied the head.

MR. MURPHY: For the record.

THE COURT: Yes, that would be Defendant's Exhibit "B."

THE DEFENDANT: Yes, Defendant's Exhibit "B."

Q. Now, how many people in this particular lineup that had a vest? A. I think one or two.

Q. What? A. One or two. I still didn't pay too much attention to it. I saw the picture yesterday and I saw it three times today.

Q. You still haven't paid attention to how many people in the lineup had a vest? A. No, I didn't look. I just looked at the face, as I told you.

THE DEFENDANT: At this time I would like for the Court to admit this into evidence.

THE COURT: You what?

THE DEFENDANT: So I can show it to the jury.

THE COURT: Any objection to admitting it in evidence?

[fol. 295] MR. MURPHY: No objection.

THE COURT: All right, Exhibit "B" will be admitted into evidence then.

You may show it to the jury; yes.

(Thereupon, photograph of lineup, previously marked as Defendant's Exhibit "B" for identification, was received in evidence.)

(Defendant exhibits photograph to the jury.)

THE COURT: All right, Mr. Banks.

THE DEFENDANT: I have no further questions, your Honor.

MR. MURPHY: I just have one question or two.

REDIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Wong, showing you this shirt, I believe you have already stated this looks like the shirt. Now, when you talk about a floral pattern, is that what you mean? A. Yes, it was that color.

Q. This falls within the meaning of a floral pattern, is that what your testimony is? A. Yes. At that time they asked me what kind of flower pattern, and—

THE COURT: You have answered the question, yes.

MR. MURPHY: That is all I have.

THE COURT: All right.

Do you have any questions on the floral pattern, Mr. Banks?

THE DEFENDANT: Yes.

[fol. 296] RECROSS EXAMINATION

Q. (By the Defendant) Mr. Wong, I would like you to take this shirt and examine it good. I want you to look at it good. I want you to see if there is any flower pattern on this shirt whatsoever. A. Those dark spots. Do you see the flower, or do you have to have a big flower to have a flower pattern?

Q. This isn't even a small flower.

THE COURT: Well, this is argumentative.

Any further questions?

THE DEFENDANT: No further questions.

THE COURT: All right.

MR. MURPHY: That is all.

THE COURT: The witness is excused.

(Witness excused.)

THE COURT: All right, then, we will recess until 2:00 p.m.

I will again admonish the jury not to discuss the case among themselves or with anyone else or to form or express any opinion at this time.

See you at 2:00.

Now, Mr. Banks and Mr. Murphy, if you have any matters to take up in chambers, will you be ready to go at twenty minutes to 2:00, so that we can start with the jury sharply at 2:00 o'clock?

THE DEFENDANT: Yes, sir.

MR. MURPHY: Yes, sir.

[fol. 297] THE COURT: All right.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.)

[fol. 298] AFTERNOON SESSION
2:00 P.M.

THE COURT: All right. Stipulated the jury is all present?

All right, Mr. Murphy.

MR. MURPHY: The People will call Mr. Jow.

HARRY JOW,

called as a witness on behalf of the People, having been duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: Your name, please?
THE WITNESS: Harry Jow.
THE CLERK: That is spelled, J-o-w?
THE WITNESS: J-o-w, yes.
THE CLERK: And your first name is Harry?
THE WITNESS: Harry.
THE CLERK: Thank you. Take the stand, please.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Jow, calling you attention to the 4th of May of this year, were you employed at Vince's Liquors at that time? A. Yes, sir.

Q. Are you still employed there? A. Yes, sir.

Q. Now, on the 4th of May of this year, about around 11:00 o'clock in the evening, were you on duty at that [fol. 299] time? A. Yes, sir.

Q. All right. Did anything unusual happen while you were on duty at that time? A. Well, we was tending to business as usual. There was a line-up of customers there, and then some fellow came in and went to the counter, and I asked him, "Yes, sir, could I help you?"

And then he got his hand up there and stick it up like that (indicating), and said, "Yes. Give me all your money."

Q. You are indicating a motion with your hand. What did he do with his hand? A. He had his hand in his pocket, indicating that he had a gun.

Q. What kind of a jacket or sweater or coat did he have on? A. He had kind of a dark sport coat on.

Q. Which hand did he have in his pocket? A. His right hand.

Q. And where did he put his right hand? A. Right up on the counter, in his pocket, pointing at me, indicating that he had a gun.

Q. All right. What did you do after he did that act and asked for the money? A. Well, then, I asked him, "What do you want?" I asked him again, "Could I help you?" And he said, "Yes, I want all your money." See? And then he said, "Do you want to die?" I said, "No." And then he said, "Then give me all your money." So I tried to get my partner's attention. And the next time he looked over at me, then I tried to punch the cash regis-
[fol. 300] ter, you know, I was going to give him the money, see. And at that time my partner grabbed a gun from underneath the counter and hit him over the hand.

Q. Now, showing you People's Exhibit No. 18, do you recognize that picture? A. Yes. That is the liquor store where I was employed as clerk.

Q. All right. Now, do you recognize the scene shown in People's No. 19? A. Yes, that is the interior of the store where I was working.

Q. All right. And how many cash registers are there? A. There was two.

Q. Were you behind one of the cash registers? A. I was behind one of the cash registers.

Q. All right. And did you do anything in regard to that cash register at the time he was talking to you and asking for the money, demanding the money? A. Yes. I made the motion that I tried to open the cash register to give him the money.

Q. I see. Now, that person that was in the store at that time, do you see him here in the Courtroom? A. Yes.

Q. Will you point to him, please? A. He is sitting over there (indicating).

THE COURT: The witness has indicated the Defendant.

Q. (By Mr. Murphy) Now, I show you—Or, incidentally, did you see whether or not he had a hat on? [fol. 301] A. He had a hat on.

Q. All right. Did you see whether or not he had some kind of a shirt on? A. He had a yellowish shirt on.

Q. First of all, I want to show you what appears to be a sport coat, and ask you if that resembles the coat that the man had on at that time? A. Yes, that resembles the coat that he had on.

Q. I am showing you a sport shirt. Does that resemble the sport shirt that the man had on on that occasion? A. Yes, that is the shirt he had on.

Q. I am showing you a dark colored hat. Does that resemble the hat the man had on at that occasion? A. Yes, that is the hat he had on.

Q. Now, after Mr. Wong hit the man on the hand with the gun, what happened then? A. Well, he stepped back and cussed Mr. Wong out.

Q. Do you remember what he said? A. Well, there was a crowd there, and I was a little excited and I didn't get quite what he said.

Q. Well, what did he do after that? A. Then he started to walk slowly out through the door, out to the street.

Q. Did you see what direction he went when he got out to the street? A. As he went out the door, he turned left to go toward north.

[fol. 302] Q. He turned left, and by turning left he would be going north; is that what you mean? A. Yes.

Q. What street was that? A. That would be up Peralta Street toward Berkeley way.

MR. MURPHY: All right. I think that is all I have of this witness.

THE COURT: All right, Mr. Banks.

CROSS-EXAMINATION

Q. (By the Defendant) Mr. Jow, how much distance is there between the cash register and—How far apart are the cash registers in the store? A. About five feet apart, approximately five feet, more or less, give a foot each way.

Q. And you say this robber came up to you as you were on duty in the store and told you to give him all the money; is that right? A. Yes, sir.

Q. About what time was this? A. Approximately 11:00 o'clock.

Q. Approximately 11:00 o'clock? A. Yes.

Q. Is that right?

Mr. Jow, were you called down to the police headquarters? A. Yes, my partner did.

Q. I say, were you called down to the police headquarters? A. I didn't call down. What do you mean by that?

Q. Did anyone ask you to come to the police headquar-
[fol. 303] ters the following day A. The following day, yes.

Q. And when you arrived at the police headquarters, where did you go? A. We went down to the station there and—

THE COURT: Well, actually, this was not within the scope of the direct examination.

THE DEFENDANT: What did you say, your Honor?

THE COURT: The direct examination did not go into anything except the night of May 4th.

THE DEFENDANT: Well, your Honor, I established the fact, I believe, with Mr. Wong, that Mr. Jow also appeared at the show-up.

THE COURT: Well, yes, but that was not within the scope of the direct examination.

If you wish to go into that, you will have to call him as your witness.

Q. (By the Defendant) Mr. Jow, have you ever seen the Defendant in this case before?

MR. MURPHY: Object to that as ambiguous, your Honor. Before what? In point of time.

THE COURT: Well, I presume before this moment.

THE DEFENDANT: Yes.

THE WITNESS: What did he say?

THE COURT: Have you ever seen the Defendant before?

THE WITNESS: Not prior to the store incident where he came to try to hold us up.

[fol. 304] Q. (By the Defendant) You have never seen the Defendant in this case prior to the time that you was robbed in this store; is that right? A. That's right.

THE COURT: You are referring to May 4?

THE DEFENDANT: May 4.

Q. Mr. Jow, after this robber had left your store, did any police officers arrive at your store that night? A. Yes.

Q. About how long after this robber had left did the police arrive? A. Well, it was about six or seven minutes after that they arrived. That is my guess, about six or seven minutes.

Q. At that time did you make any statement to the police? A. When the police arrived, yes, we made a statement.

Q. I mean. you. Did you make any statement to the police? A. The police come there and asked us to give them the description of the robber.

Q. Mr. Jow, what statement did you give the police? A. Well, he asked us to give him the description.

Q I don't mean "us," I mean you. A. He asked me and Mr. Wong for the description of the robber.

Q. Yes, and what description did you give? A. Well, we were supposed to be watching, and I would say, me and Mr. Wong—

Q. I am asking you what statement did you give, Mr. Jow? A. We were both there talking, and we said he [fol. 305] was about 160 pounds, around that weight.

Is that what you want?

Q. Did you say, "160 pounds, around that weight"? A. Around that, give or take a few pounds. About that.

Q. Did you make a statement, "150 or 60 pounds"? A. One hundred fifty or sixty pounds, yes.

Q. And what happened after that, Mr. Jow? What else happened after that, Mr. Jow, concerning the description of the robber? A. You mean, what else he asked us?

Q. Yes. A. His height, and the clothes he wore, that sort of thing, you know, a general description.

Q. Did you notice any scars on the robber's face? A. Well, the thing come up quite suddenly, and I was a little excited.

Q. I am talking about this particular night. Did you notice any scars on the robber's face when he was in this particular store? A. I noticed a scar right around the, let me see, the left side of his face.

Q. Did you tell the police about this scar? A. No, I didn't tell them that.

Q. Why didn't you tell the police about this scar, Mr. Jow? A. Well, I told him that—Well, I was a little excited and probably forgot it.

Q. Have you ever told the police about this scar, Mr. [fol. 306] Jow? A. I said I think he had a scar, or something.

Q. I say, have you ever told the police, to your knowledge, about this scar? A. I didn't tell them that.

Q. Now, you are on the stand and you say that the robber had a scar. Wouldn't it have been part of the identification of a robber suspect that you should give this information also to the police?

MR. MURPHY: Object to that as argumentative.

THE COURT: Yes, the form of the question is argumentative. The subject is proper. You can reframe the question, Mr. Banks.

Q. (By the Defendant) By you failing to give the police this information, would you consider that as withholding information from the police, Mr. Jow?

MR. MURPHY: I object to that.

THE COURT: Yes, it is immaterial.

Q. (By the Defendant) Did you notice whether the robber had a beard, Mr. Jow? A. A beard?

Q. Yes. A. He didn't have no beard. The beard is underneath, like here (indicating). No beard.

Q. Did he have a mustache, Mr. Jow? A. He had kind of a light, a little mustache, a shade of it.

Q. Did he have any whiskers on the lower lip, alongside the bottom lower lip? Did he have any whiskers along the bottom lower lip? A. A little, yes.

Q. What did you say? A. A little bit.

[fol. 307] Q. Did he have any hair on the chin, Mr. Jow? A. No.

Q. A goatee? A. No goatee; no goatee.

Q. Have you ever discussed any of this with anyone other than Mr. Wong? A. No.

Q. But you and Mr. Wong have discussed this; is that right? A. Yes.

Q. Have you discussed this in the last two days? A. No.

Q. You haven't? Did you tell the police, Mr. Jow, about this robber having a beard? A. No.

Q. Did you tell the police about this robber having a mustache? A. Yes.

Q. You told the police this robber had a mustache? A. Yes.

Q. But you didn't tell the police the robber had a scar?

MR. MURPHY: Object to that as asked and answered.

THE COURT: Well, he can go into it a second time on cross.

Q. (By the Defendant) Did you tell the police the robber had a scar? A. I said he had sort of a scar.

Q. You told the police this? A. Yes, he had sort of a scar.

Q. Mr. Jow, a few minutes ago you said you didn't tell the police that the robber had a scar. Now you say you told the police the robber had a scar. Which one of these two statements are true, Mr. Jow? A. Well, it is [fol. 308] over three months ago, and I don't remember very clearly; but I think I did tell him about having a scar on the left side of his face.

Q. Mr. Jow, do you ever recall talking to an officer, police officer, by the name of Mr. Ticksman? A. No.

Q. Say, on May 4th, 1962, 300 hours? A. Two officers come down, but I don't know their names.

Q. Mr. Jow, you said this is the first time that you have seen the Defendant in this case. A. On the 4th of May, 11:00 o'clock, that is the first time I have seen him.

Q. And here in this Courtroom? A. And he is here in this Courtroom.

Q. You have never seen the Defendant before that? A. No.

Q. At no time prior— A. No time.

Q. —to the 4th of May? A. No.

Q. Until now? A. That's right.

Q. In other words, you have only seen the Defendant in this case twice; is that right, according to your statement? A. I didn't say I seen him twice. That is the first time I had seen him.

Q. Have you seen the Defendant in this case on the date of May 5th? A. Yes.

Q. And where did you see this Defendant on the date of May 5th?

MR. MURPHY: This is going into matters beyond the [fol. 309] scope of the direct examination again.

THE COURT: Well, it is admissible for the question of identification of the Defendant. The details of the line-up and all that would not be admissible, but the number of times he has seen him and where, that sort of thing, would be.

Q. (By the Defendant) Did you see the Defendant on May 5th? A. I did.

Q. And where? A. Right in the police—in the police station, way up on—I think it was—the 14th floor in the City Hall.

Q. But I want to get your memory straight. I want you to think hard now. A. Oh, yes, I will.

Q. You say you haven't seen the Defendant at all on May 5th, you seen him on May 4th and in this Courtroom today.

MR. MURPHY: Object to that as misstating the evidence.

THE COURT: Yes, that is a misstatement of the evidence.

Q. (By the Defendant) And when you seen this Defendant on May the 5th, what did you say, if anything? A. What do you mean by that? What did I say to who, to whom? There was a lot of people there.

Q. To the police officer.

MR. MURPHY: Well, I think that is calling for hearsay at this point.

THE COURT: Well, unless this is connected with the identification, it is immaterial.

THE DEFENDANT: That's right, it is connected [fol. 310] with the identification, your Honor.

THE COURT: Well, the witness can answer the question and we will see.

Will you repeat that, please?

Q. (By the Defendant) When you seen this Defendant on May 5th at police headquarters in the presence of the police officer that you was with, what did you tell him?

THE COURT: When you say "him," who is that, the Defendant or the police officer?

THE DEFENDANT: The police officer.

THE WITNESS: The police officer asked us to identify the suspects that was lined up on the outside of the corridor.

Q. (By the Defendant) And what did you tell him? A. I told him that it was that third person that resembled very likely the one that came and robbed us last night.

Q. The third person resembled the robber? A. Yes.

Q. And what did this third person have on? A. He had on a hat, dark hat, sport jacket and yellow shirt.

Q. And what did the other people that you had seen—

THE COURT: The lineup, now, is not before us. All we are interested in is how often he had seen the Defendant and the circumstances.

THE DEFENDANT: All right, your Honor.

Q. And you told this inspector what? A. I said, "That is the fellow out there. He looks like that is the fellow." [fol. 311] Q. Did you tell the inspector that you weren't sure? A. I said, "I am not positively sure, because the light glares on the glass and that affects my vision."

Q. And what are your vision, Mr. Jow? A. My vision is fair.

Q. Fair? Mr. Jow, how clearly can you see? A. I see clearly.

THE COURT: Well, now, Mr. Banks, the question "How clearly can you see," is a comparative.

The subject you are going into is proper, but the question is argumentative and calls for an opinion.

Q. (By the Defendant) Do you wear glasses? A. I don't have to wear glasses, particularly. I don't when I work.

Q. You do when you work? A. I don't when I work.

Q. What do you wear glasses for? A. I wear glasses when I drive.

Q. Only when you drive? A. Yes.

Q. And what else did you tell the inspector about this suspect, Mr. Jow? A. I don't recall ever telling him anything else.

Q. The only thing you told the inspector is that you was not sure; is that right? A. I didn't say, "I'm not sure," I said, "That is the very person. He looks exactly like the fellow that came and robbed the store."

Q. You said, "He looks just exactly like the fellow that [fol. 312] came and robbed the store"? A. Yes. "He looks exactly like the fellow that robbed the store."

Q. Mr. Jow, did this robber that was in your store, did he have a tie on? A. No tie.

Q. Did he have his shirt collar buttoned at the top, shirt collar buttoned? A. At that moment, I don't recall. In the excitement at that time I did not recall that.

Q. Did his shirt have a flower design on it? A. It is a yellow shirt, with some dots, you know, dots on it, or something like that.

Q. What? A. It is a yellow shirt.

Q. Yes. Did it have a flower design on it? A. No, it don't have a flower design; it was a flower, kind of yellow.

Q. Flower, kind of yellow? A. Yes.

Q. And what color was this sport jacket that the robber had? A. The sport jacket, I would say, must have been a gray color, dark gray color.

Q. And what color hat did you say he had, the robber had on? A. You mean hat?

Q. Yes. A. Dark color hat.

Q. Mr. Jow, have you read any notes concerning this case anywhere? A. No, I didn't read no notes.

Q. Have you viewed any pictures that resembled the suspect in this case? A. You mean, have I seen a picture? [fol. 313] Q. Yes. A. Yes, I seen it.

Q. And where did you see his picture at? A. I seen that picture when one of the officers brought it down to the store.

Q. And when was this that the officer brought the picture down to the store? A. About a little over a week ago.

Q. And what did he tell you was the purpose of this picture? A. He asked if that is the fellow that came and robbed the store.

Q. Have you seen any other pictures of this suspect? A. No, I didn't see no other pictures.

Q. But they did refresh your remembrance with this picture of this suspect?

MR. MURPHY: Object to that as argumentative.

THE COURT: Yes, the form of the question is argumentative.

Q. (By the Defendant) Did this picture refresh your memory of the suspect? A. Yes, that picture refreshed my memory of the suspect. I had a closer look at it.

Q. Did you see anything on this picture that you had missed seeing before? A. No.

Q. Did you make a good study of the coat that the suspect in this picture was wearing? A. Yes. He was only two and a half or three feet away from me, facing directly at me.

Q. And you could see from this picture that this sus-
[fol. 314] pect wasn't wearing a tie? A. No, he didn't wear no tie.

Q. And you could see from this picture that this suspect had a beard? A. No beard.

MR. MURPHY: Now, just a minute. I am going to object to these questions as ambiguous.

It isn't clear whether he is asking about the picture or about the robber in the store.

THE COURT: Yes.

Are you referring to the picture?

THE DEFENDANT: Yes, I am referring to the picture which they showed him of the suspect, your Honor.

THE COURT: All right.

THE WITNESS: The picture has no beard.

Q. (By the Defendant) All right. Does this picture refresh your memory that the suspect has a mustache? A. I don't recall seeing it there. It might be a slight shadow.

Q. But you saw this picture? You were shown this picture a week ago? A. Yes, over a week ago.

Q. And the night of the robbery was when? A. Oh, Friday night, May the 4th.

Q. And you seen a suspect the following day, which was May the 5th? A. Right.

Q. At the police headquarters; is that right? A. Yes, that's right.

Q. Then a week ago you was, from the present date [fol. 315] you was shown another picture of this suspect? A. Yes, that's right.

Q. Mr. Jow, on the night of the robbery, on the night of May the 3rd, or May the 4th, when this robber appeared in your store— A. On what date?

Q. On May 4th. A. On May 4th, at approximately 11:00 p.m.

Q. Did you tell the police that your partner hit the robber on the hand or the arm? A. Yes, right on the hand.

Q. What?

THE COURT: Read the answer.

(Answer read.)

Q. (By the Defendant) Did you say hand? Very well. You didn't make a statement that he was hit on the hand or arm? A. Not on the arm, right on the hand.

Q. After viewing the suspect in this particular case, Mr. Jow, could I get you to give me an estimation as to his height? A. His height at that time, when I gave it to the officer, was about five feet six or seven.

Q. Five feet six or seven? A. That's right, to my estimation. Of course, I don't have a ruler and measure how high he is. I didn't say, "Wait for me, let me measure you."

Q. Well, you said about five foot six. A. That is just an estimation. Or seven, five foot seven.

Q. And the suspect had a hat on, so what would you estimate the suspect's hat to be?

[fol. 316] THE COURT: The question isn't clear. What do you mean? Do you mean to the top of the hat?

THE DEFENDANT: Yes.

MR. MURPHY: Is this the suspect's height or the suspect plus his hat?

THE COURT: I don't know.

MR. MURPHY: It isn't quite clear.

THE COURT: Clarify your question, Mr. Banks.

Q. (By the Defendant) If the suspect had a hat on, what would you estimate his height to be with a hat on?

THE COURT: A person's height doesn't change with the hat.

Q. (By the Defendant) In your opinion, what would you estimate the suspect's weight to be? A. I estimated it to be 160 to a hundred seventy, around that vicinity. I am not very good at weight. That is just a guess.

Q. What kind of trousers did the suspect have on? A. I didn't notice the trousers, because the counter was right in the way.

Q. I didn't say the robber, I said the suspect. A. I didn't notice.

Q. Well, what kind of trousers did the robber have on?

THE COURT: Well, Mr. Banks, you just got finished asking him the question.

Q. (By the Defendant) Mr. Jow, you stated that you had given a picture, that you were given a picture of the suspect about a week ago; is that right? A. A little over a week ago.

[fol. 317] Q. A little over a week ago.

I will at this time show you a picture of the suspect.

Is that the picture you viewed of the suspect about a week ago? A. Yes, that is the picture of the suspect.

MR. MURPHY: May that be marked? Is it already in evidence? Is it already marked?

THE DEFENDANT: It is already marked.

THE COURT: Yes, that is Exhibit "A."

THE DEFENDANT: Yes, that is Exhibit "A," your Honor.

Q. Mr. Jow, is it very likely that you would forget the semblance in that picture and the semblance of the suspect over a period of a few days?

MR. MURPHY: Well, will object to that as calling for the opinion of the witness.

THE COURT: I couldn't even follow the question, counsel, to understand it.

Read the question.

(Question read.)

THE WITNESS: No, I wouldn't forget that.

Q. (By the Defendant) Did that picture help you make up your mind in identifying the suspect, Mr. Jow?

A. No, that doesn't help. I said, "That fellow is the one. He is the one."

Q. After not being sure, Mr. Jow?

MR. MURPHY: What? Object to that as argumentative.

[fol. 318] Q. (By the Defendant) After not being sure, Mr. Jow?

MR. MURPHY: Object to that as being argumentative.

THE COURT: Well, he can answer the question.

Do you understand the question?

THE WITNESS: Well, like I say, on the lineup, the lineup they had there—

THE COURT: Read him the question.

(Question read.)

A. Well, the glass, the glare on the glass affected my vision, so naturally I am not too sure.

THE COURT: What glass are you referring to?

THE WITNESS: The glass in the door up there.

THE COURT: The glass in the door?

THE WITNESS: Yes. But after looking at him right there, I am pretty positively sure he is the one.

Q. (By the Defendant) Mr. Jow, at the time you viewed the suspect on the 5th, did you have the opportunity to see the suspect without the glass door between you? A. There was a glass between us.

Q. Was that door ever opened while you was in the room? A. That door was opened afterwards when two of the boys went out to identify the robber.

Q. But when it was opened, did you see the suspect then? A. No, I didn't see him. I was in the back of the room. I do not know which one they identified.

Q. You didn't see the suspect at the time the door was [fol. 319] open; is that right? A. No, I did not see the suspect when the door was open.

Q. But you did see the suspect looking through the glass? A. I did see him through the glass.

Q. And at this particular time you was not too sure; is that right? A. Like that glass was not too clear for me to look through, so I am not too sure at that time.

Q. But after seeing a picture of the suspect a week ago, your memory was refreshed, you had a clear view, he looked like the fellow; is that right? A. Yes, that's right.

Q. Did you know the name of the officer that showed you this picture of the suspect? A. I told you before, I don't know the name of the officer.

Q. Did he bring this picture to your store where you are employed at? A. He bring the picture down to my house.

Q. And who all was present when he showed you this picture of the suspect? A. Just my mother.

Q. And nobody else? A. Nobody else.

Q. Have you talked to Mr. Wong? A. About what?

Q. About this picture? A. This picture?

Q. Yes. A. I mentioned it.

Q. And what did you tell Mr. Wong about this picture? A. I didn't tell him anything, I just said the officer bring the picture down and at the same time showed me the subpoena.

[fol. 320] Q. Did you describe to Mr. Wong what the person in this picture had on? A. No.

Q. Did you discuss any marks or scars with Mr. Wong? A. I did not discuss—

Q. About this picture. A. —with Mr. Wong about it.

Q. You never discussed any of this case with Mr. Wong? A. Particularly about this robbery case?

Q. Yes. A. Well, we discussed when it will come to trial, and things like that.

Q. Did you ever discuss with Mr. Wong what the suspect looked like? A. We didn't have to discuss that, because we already seen him.

Q. Did you and Mr. Wong compare notes on what you all had seen? A. No, we don't have to compare notes. He seen it with his own eyes, and I seen it with my own eyes.

Q. Mr. Jow, who influenced your opinion? A. Nobody.

MR. MURPHY: Object to that.

THE COURT: Yes, that is an improper question. There is no evidence that his opinion has been influenced.

Q. (By the Defendant) Now, Mr. Jow, did you state to the police on the night of this particular robbery that the suspect ran? A. The suspect did not run; he walked slowly out.

Q. Mr. Jow, at the time that you seen the suspect leave, [fol. 321] the robber leave the store, which way did he go? A. He went out the store and went northward, up Peralta Street.

Q. He didn't go east on 11th Street? A. No.

Q. Your store is on the corner of Peralta and 11th Street; is that right? A. Peralta and 12th.

Q. Peralta and 12th Street.

And the entrance to your store is on which street? A. Peralta Street.

Q. Peralta? A. That's right. You ought to know.

Q. And how many entrances to this store? A. Just one front one and one rear one.

Q. One front and one rear. Did the robber leave by the front exit or the rear exit? A. Right in the front.

Q. And when he got out of your store, did he run? A. He did not run.

Q. In viewing the suspect in the lineup, did you tell the inspector about the glass that you was unable to see out of? A. I just said I couldn't see clearly through the glass. I made a remark that the glass was between us and I couldn't see very clearly.

Q. And when the door was opened, did he tell you to view the suspect? A. No.

Q. You are sure he didn't?

Withdraw that.

Was it you or Mr. Wong, on the night of this robbery, [fol. 322] that stated to the police that the suspect said, "Do you want to die"? A. The robber said that to me.

Q. And you told it to the police that night; is that right? A. Yes, I told them that.

Q. Did you also tell the police that Mr. Wong reached under the counter and pulled out a gun? A. Yes.

Q. And hit the suspect? A. Right on the hand.

Q. Or arm? A. What is that?

Q. Or arm? A. No, not the arm, the hand.

Q. Did you tell Mr. Wong, on the night the suspect was in your store,—

I will withdraw the question.

Did you tell the police on the night that you was interviewed by them concerning this robbery that the robber

had tried to rob you? A. He was in the act of it. He didn't have to tell me, he had his gun pointing out.

Q. And which cash register did this take place at? A. It was the one that I was working at.

Q. And which one were you working at? A. I was working on the rear one. There is a front cash register and a rear cash register. I was working at the rear one.

Q. Was the robber drunk? A. Not drunk; he was not drunk.

Q. Did you ever say anything to Mr. Wong about the robber being drunk or not drunk? A. No. I said he is not drunk.

Q. About a week ago, Mr. Jow, was that the first time [fol. 323] that you had seen a photograph of the suspect? A. Yes, a little over a week ago was the first time I seen it.

Q. At that time had you been notified to appear in court? A. No. That was the time I—They notified me with the subpoena to appear in court.

Q. And this photograph would help you, if you had appeared in court that day, to refresh your memory of the suspect? A. It does not help me. It don't have to be refreshed. When a person points a gun at you at about three feet, you will remember it.

Q. Did you see a gun, Mr. Jow? A. I didn't see a gun, but with his hand in his pocket, it could be a gun.

Q. But you just made a statement that a person pointed a gun at you.

MR. MURPHY: Just a minute—

A. It could be a gun.

THE COURT: That is not a question, so there is no answer.

Q. (By the Defendant) But you didn't see no gun? A. It could be; it could be a gun.

Q. All right. I said you didn't see any gun, did you, Mr. Jow? A. I didn't see no gun, but his hand was in his pocket, and you cannot see through clothes. I don't know what is underneath.

Q. The only gun you saw that night, Mr. Jow, was your boss' gun; is that right, Mr. Jow? A. What do you mean, my "boss"?

[fol. 324] Q. Mr. Wong. A. Mr. Wong. Yes, I seen that gun. There is such thing as a concealed gun. Yours was a concealed gun.

Q. Mr. Jow, you was not too sure when you viewed the suspect in the lineup that he was the robber; is that right? A. Right. Through the glass, my view had been blocked by the glass. I was not sure then.

Q. But you did see through the glass? A. My view was blocked, and it was not very clear.

Q. The glass was not very clear? A. I looked at it, and it was not very clear; my view as not like it should be.

Q. And you told the inspector that you was not sure; is that right, Mr. Jow? A. I told him that I was not sure, positively, that I was not too positive.

Q. That's right; you told him you was not sure. Is that right, Mr. Jow? A. That's right.

Q. Well, what makes you so sure now, Mr. Jow? A. I see you right here, standing on your two feet, and I am pretty sure. There is no glass between us.

THE DEFENDANT: Your Honor, I would like to kind of consult a few minutes with Mr. Shaughnessy.

THE COURT: I didn't understand you.

THE DEFENDANT: I would like to consult a few minutes with Mr. Shaughnessy.

[fol. 325] THE COURT: You want to consult with Mr. Shaughnessy?

THE DEFENDANT: Yes.

THE COURT: All right, then, we will take the afternoon recess at this time.

I will again admonish the jury not to discuss the case with anyone or form any opinion at this time.

(Afternoon recess taken.)

THE COURT: All right. Stipulated the jury is all present.

Mr. Jow, will you take the stand, please.

All right, Mr. Banks.

Q. (By the Defendant) Mr. Jow, on this photograph, which was shown to you about a week ago, of the suspect, did it put you to thinking about the suspect? A. That doesn't put me to thinking.

Q. But it still made you a little—After viewing it, it made you a little bit more sure that you were looking at the suspect; is that right? A. It made me sure I was looking at the robber.

Q. If you hadn't viewed this picture, you would have been not too sure of the robbery suspect; is that right? A. After I see you, I am positively sure.

THE DEFENDANT: No further questions.

MR. MURPHY: I have no questions.

THE COURT: All right. You are excused, Mr. Jow. Thank you.

(Witness excused.)

[fol. 326] MR. MURPHY: The People will call Mr. Perry.

ROBERT E. PERRY,

called as a witness on behalf of the People, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: What is your name, please?

THE WITNESS: Robert E. Perry.

THE CLERK: How do you spell your last name?

THE WITNESS: P-e-r-r-y.

THE CLERK: Thank you. Will you take the stand, please.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Perry, calling your attention to the 4th of May of this year, about 11:15 in the evening, were you at a liquor store known as the Three Point Liquors on Peralta? A. Yes.

Q. What is that exact address of that liquor store? A. 16—What is the exact address?

Q. The address, do you know that? A. 1624, I think, Peralta.

Q. Peralta Street. Now, you were employed at that liquor store, is that correct? A. Yes.

Q. Mr. Perry, on that particular occasion, around 11:15 or so in the evening, did anything unusual happen? A. Yes, it did.

[fol. 327] Q. Will you describe for the jury just what did happen? A. Well, I was on duty around 11:15, and this fellow here (indicating), he walked in and told me to hand over the money.

Q. Now, you pointed to a person at the counsel table. A. Yes, sitting right there (indicating).

MR. MURPHY: Let the record show that the witness has identified the Defendant.

THE COURT: Yes, the witness has identified the Defendant.

Q. (By Mr. Murphy) He said to you what? A. "Hand over the money." And I thought he was kidding, and about that time another customer walked in and asked for some gin, and he said, "If you don't want to jeopardize your life, hand over the money." He said, "And I'm not kidding."

So I saw he meant business at that time, and he had his hand in his coat pocket, and I walked around, opened the till and handed him part of the money, and he said, "That isn't all. Give me all of the money," and he backed on out and he said, "Don't reach for anything."

Q. Let me take these things one at a time. You said he walked up to the counter first. A. Yes.

Q. And asked you for the money. A. Yes.

Q. Now, when he first walked up there, where was his hand? A. I didn't pay that much attention to where his hand was when he first walked up, but when he told me that he wasn't kidding, then that is when I paid attention. He had his right hand in his pocket like this (indicating), simulating a gun.

[fol. 328] Q. What kind of a coat did he have on at the time? A. He had on a sport coat with a little check pattern on it, it looked like to me, a sport coat.

MR. MURPHY: Now, may the record show that the witness has his right hand in his coat pocket.

THE COURT: The record will so show.

Q. (By Mr. Murphy) And you are waving it back and forth. Is that the way he was doing it? A. Right. When he said he wasn't kidding, yes.

Q. And did you—After he told you that, you said some other customer came up there. A. Yes.

Q. And what did the other customer do? A. The other customer asked for some gin, and then that is when he said he wasn't kidding.

Q. Now, who said he wasn't kidding? A. This fellow here (indicating).

Q. The Defendant here? A. The Defendant said that.

Q. He said that to you or to the other fellow? A. To me. So the other fellow ran out of the store, backed out of the store.

Q. And after he said he wasn't kidding, what did you do then? A. I handed him the money.

Q. And how much money did you hand him at first? A. I don't know exactly how much, but when he looked it over and saw, oh, it wasn't enough to satisfy him, he said, "That isn't all. Give me all of the money." So I [fol. 329] gave him the rest of it.

Q. All right. I show you, first, a picture of a building. Do you recognize that building? A. Yes, that is the Three Point Liquor Store. That is the building where I work.

MR. MURPHY: May that be marked as People's next in order? I will offer that in evidence.

THE COURT: Yes.

THE CLERK: 23, your Honor.

THE COURT: All right. The photograph will be admitted into evidence as Exhibit 23.

(Thereupon, photograph of Three Point Liquor Store was received in evidence and marked as People's Exhibit No. 23.)

Q. (By Mr. Murphy) I am showing you another picture, and ask if you recognize the scene shown on that picture? A. Yes, this is the counter in the Three Point Liquor Store.

Q. That is the interior of the liquor store? A. Yes.

Q. Where were you—

Withdraw that.

Could you place in this picture approximately where you were when the man came in? A. Oh, I was standing behind the counter, approximately there where the fellow is standing (indicating).

Q. You were standing approximately where the man in the picture is standing at the time? A. Yes.

[fol. 330] MR. MURPHY: All right. May this be marked as People's next in order in evidence?

THE COURT: Yes. All right. The photograph will be admitted into evidence as Exhibit 24.

(Thereupon, photograph of interior of Three Point Liquor Store was received in evidence and marked as People's Exhibit No. 24.)

Q. (By Mr. Murphy) Mr. Perry, about how much money did you give him, if you know? A. No, I don't know how much I gave him. I think it was at least close to a hundred dollars. I mean, I don't know exactly how much I gave him.

Q. All right. Now, besides the coat that you mentioned, do you remember any of the other clothing that he was wearing at the time? A. He had on a brown, a little sport hat. I would consider calling it a sport hat, a brown hat.

Q. Do you remember what the shirt looked like? A. No, I didn't pay any attention to that.

Q. I will show you, first, People's Exhibit No. 21.

Does that resemble the hat the man wore on that occasion? A. Yes, it resembles the hat; yes.

Q. I am showing you a sport coat, which is People's Exhibit No. 20. Does that sport coat resemble the coat the man wore on that occasion? A. Yes, that resembles it.

[fol. 331] Q. Now, at the time that you observed this man who came into the store, whom you have identified as the Defendant, did you notice anything about his face in particular? A. Yes, he had a scar, a mark, on the left side of his face.

Q. You are indicating—You are pointing to your— A. Right there (indicating).

Q. Above the left lip area? A. Yes.

Q. Left corner of the left lip; is that correct? A. Yes.

Q. Now, after observing him in the liquor store, did you have occasion to see this man again later on? A. Yes, in the lineup, I did.

Q. Now, when did you see a lineup? A. The following day, the next day.

Q. And how many people were in the lineup? A. There were either three or four. I didn't pay any attention, because the time I saw him, I didn't even pay any attention to the rest of them. I mean, at the time I looked through, I saw him.

Q. Did you see the Defendant here in that lineup? A. Yes.

Q. Do you remember which person he was, or which number he was in the lineup? A. Three, I think.

Q. After the man got your money in the liquor store, on that occasion, did he go out the door? A. Yes, he backed out the door.

[fol. 332] Q. Did you see where he went after he went out the door? A. No. I know that he turned, went up toward McKenzie's service station, so he turned right.

Q. In other words, when he came out of the door of your liquor store, did he turn to the left or to the right? A. To the right.

Q. I am showing you People's Exhibit No. 23.

Where is the door to the Three Point Liquor Store in that picture? A. Right here (indicating).

Q. Right above the rear end of the Cadillac in the picture? A. Yes.

Q. And on this picture, when he came out the store, did he turn in the direction— A. He went up toward McKenzie's service station.

Q. You are pointing to the right? A. Yes.

Q. As you face the picture. A. Right.

Q. But when he came out of the door of the liquor store— A. He was backing out. He was backing out.

Q. Oh, I see. When he went out, he backed up and then he went— A. To his right.

Q. I will have you put an arrow on the picture, indicating the direction he went when he went out of the liquor store. A. He back out the door, and if he had come by this way (indicating), I would have seen him through the glass.

Q. What street is the liquor store on? A. The corner of—It is on Peralta.

[fol. 333] Q. And it is on what corner, what intersection? A. 17th.

Q. When he came out, did he go toward 18th or toward 16th? A. Toward 16th.

THE COURT: Why don't you put it up on the board and the witness can point it out to the jury so they can see?

MR. MURPHY: All right.

THE COURT: Put it up as high as you can, right at the very top. There is a pointer there somewhere.

THE WITNESS: He back out the door and he turned to his right of the Three Point Liquor Store, going up toward McKenzie's service station on 16th.

Q. (By Mr. Murphy) Did you follow him out of the door, yourself? A. No. Mr. Griffith walked in, and I asked him to see which way did he go, and so I called the policemen, I called the officers, I used the telephone.

Q. Now, at the time that you saw this man in the liquor store, did you notice anything else about his face or any other particular marks? Was there something about his face that you recognized? A. His eyes. I mean, to me, it was his eyes. I will never forget them in my life.

Q. Let me ask you this: Do you remember whether or not the man had a mustache? A. Slightly.

Q. Now, incidentally, at the time you saw this lineup, did the man have a hat on or no hat on in the lineup? [fol. 334] A. At first he didn't have a hat on, and then they asked him to put a hat on; but when I first saw him he didn't have a hat on in the lineup.

Q. Now, after you had identified him in the lineup, did you see him outside of the room that the lineup is conducted in? A. Yes, I did.

Q. How did you happen to see him outside the room? A. Well, the inspector asked anyone that could positively identify him go point the man out, and I told him that I could.

Q. Did you then see him face to face after that? A. Right.

Q. Who was present when you saw him face to face on that occasion, besides yourself and this man? A. Well, the other fellows in the lineup there, and the inspector was there.

Q. And did you say anything to the inspector in the presence of the man that you identified at that time? A. I told him that was the man that held me up, that's all.

Q. And at the time you said that, did the Defendant say anything? A. No.

THE COURT: Would you answer audibly?

THE WITNESS: No.

THE COURT: Now, how far away from the Defendant were you when you said, "This is your man," in the lineup?

THE WITNESS: I walked right up close to him, right up face to face to him.

[fol. 335] THE COURT: Would you say you were two or three feet away from him?

THE WITNESS: Yes.

THE COURT: Did you point to him or anything?

THE WITNESS: Yes, I did.

THE COURT: You pointed directly at him?

THE WITNESS: At him, yes.

THE COURT: And then made the statement, "This is the man"?

THE WITNESS: Yes.

THE COURT: All right. And the Defendant did not answer you in any way?

THE WITNESS: No.

THE COURT: Was he looking at you?

THE WITNESS: Yes.

THE COURT: All right, go ahead, Mr. Murphy.

MR. MURPHY: I believe that is all I have.

Just one other question.

Q. These events all happened in the County of Alameda, State of California? A. Yes, sir.

MR. MURPHY: That is all.

THE COURT: All right. Mr. Banks?

CROSS-EXAMINATION

Q. (By the Defendant) Mr. Perry, what is your name? A. Robert E. Perry.

Q. And where do you live at?

[fol. 336] THE COURT: Keep your voice up, Mr. Banks, so we can hear you.

Q. (By the Defendant) Where do you live at? A. 5858 East 16th Street, Oakland.

Q. Mr. Perry, what kind of hat did the robber have on? A. I call it a stingy brim. That is what I call them.

Q. What color was the hat the robber had on the night that you was robbed? A. Well, to me, it was brown or Oxford gray, brown. I mean, I call it a dark brown.

Q. Would you say that was the hat (indicating)? A. It is a hat like that. It appears to be a hat like that. That is dark brown, Oxford gray, whatever color you call it. I don't know.

Q. Is that the first time, Mr. Perry, that you referred to that hat as being Oxford gray that the robber had on that night? A. Yes, it was.

Q. Did the robber's hat have a feather on the side? A. I don't remember.

Q. I ask you again, Mr. Perry, is this the first time you referred to the robber's hat as being Oxford gray or brown? A. Oxford gray or brown, brown. I think I referred to it as brown.

Q. But you didn't refer to it before as being Oxford gray at any other time, have you? A. I don't remember.

Q. Did the police have occasion to visit you the night [fol. 337] that this store was robbed? A. Did they have occasion to visit me, or did I call them?

Q. Did they have occasion to visit you? A. I called the police.

Q. Did you make any statement to the police that night? A. Yes, I did.

Q. And what color did you tell them the hat was that the suspect had on? A. If you will check the record there, you will find that I told the policemen I wasn't directly sure, but I familiarized myself with your face. I gave a complete description of you, even in the preliminary. I told them—

Q. I am not speaking of at the preliminary, but I am speaking of what happened at the— A. I don't remember. I don't remember.

Q. Now, just what color did you give—Now, what color did you tell the police that this hat was? A. I said I didn't remember.

Q. And at the preliminary, what color did you say the hat were? A. I said I didn't remember what color I said.

You read the description of what I gave of you.

THE COURT: Just answer the question he asks you.

THE WITNESS: I don't remember.

Q. (By the Defendant) When you viewed the Defendant in this case in the lineup at police headquarters, how many people was in that lineup that had on a sport coat? A. I don't remember.

Q. How many people was in the lineup that had on a [fol. 338] sport shirt? A. I don't remember.

Q. Do you have a light gray hat, Mr. Perry? A. Do I have a light gray hat? Yes, I think I have a light gray hat.

Q. Have you ever been arrested, Mr. Perry?

MR. MURPHY: Objected to as an improper question.

THE COURT: Yes, it is improper.

Q. (By the Defendant) At the time that you visited the city jail, had you ever been in that jail before, Mr. Perry?

MR. MURPHY: Object to that as immaterial.

THE COURT: Yes, it is immaterial.

Q. (By the Defendant) Mr. Perry, how many times have you seen this hat? A. I don't remember how many times I have seen the hat. Wait a minute. How many times have I seen it?

I mean, I have looked at it two or three times here today. Is that what you mean?

Q. How many times have you seen that hat before today? A. I haven't been keeping a count of how many times I saw the hat.

Q. Answer the question, Mr. Perry. A. I don't remember.

Q. Mr. Perry, did the robber have a mustache on? Did he have a mustache? A. Slightly so. I mean, I was more familiarizing myself with the face, period. Your eyes and the scar is what I could see. I can see it if I close my eyes.

[fol. 339] Q. Did he have hair on his lower lip, Mr. Perry? A. I don't remember.

Q. How many scars did the robber have on his face, Mr. Perry? A. I remember one, seeing one that stands out to me. That was the left side of his face.

Q. And in which direction did that scar run, Mr. Perry? A. I can show you. (Indicating). Now, which direction do you want to call that? I don't know.

Q. You indicated, Mr. Perry, from the point of your your nose, the lower point of your nose, down the left cheek to the— A. Your nose or my nose?

Q. Your nose. I am talking about where you are pointing to.

You were indicating with your finger. A. Well, whatever you want to call it. I am not indicating, I am just showing you.

Q. Are you sure, Mr. Perry, that the robber had a scar there? A. Am I sure?

Q. Yes. A. Yes, I am sure.

Q. Mr. Perry, when you was in the room waiting to view the suspect, how many other people was in this room? A. I don't remember.

Q. Did you go to the window first to view the suspect? A. I did.

Q. And after you viewed the suspect, how many more went to the window to view the suspect? A. I don't remember.

Q. Did you ever see a photograph of the Defendant in [fol. 340] this particular case, Mr. Perry? A. I think I did.

Q. What day was it? A. After the preliminary, whenever that was. I don't know the date.

Q. And at the time they showed you this photograph, did anyone tell you why they were showing you this photograph? A. Say that again.

Q. I said, at the time you were shown this photograph, did anyone tell you why they were showing you this photograph? A. I didn't say anyone showed it to me.

Q. What? A. I didn't say that anyone showed it to me.

Q. Well, how did you come about to see this photograph? A. I saw it in the Courtroom here after you showed it to me.

Q. You say after the preliminary? A. Well, that is after the preliminary, if you are trying to be funny.

Q. No, the preliminary was held in May. A. No, I said, I saw it after the preliminary. Any time after that would be after, wouldn't it?

Q. But you have never been shown a photograph of the Defendant other than that? A. I don't remember.

Q. Have you read the transcript of the statement you made from the preliminary hearing? A. Have I read it?

Q. Yes. A. The officer, when I gave him the report, the description, he asked me was this about right.

[fol. 341] THE COURT: He is referring to the transcript. Do you know what he mans by the "transcript"?

THE WITNESS: No, I don't know what he means by "the transcript."

Q. (By the Defendant). Have you read any of the statements that you made when you was on the stand at the preliminary? A. No, I don't remember reading any.

Q. The night that the officers came to your store on May the 4th, Friday night, on the night that you were supposed—that you reported to the police that you had been robbed, can you recall any of the statements you gave the officers? A. Can I recall any of the statements that I gave the officers?

Q. Yes, that you gave the officers. A. Yes, I can recall some of them; yes.

Q. And what were they?

MR. MURPHY: Well, I am going to object to this, your Honor. I don't think it is proper to ask him what he said on a previous occasion in this matter.

It is certainly not impeachment, it is calling for hearsay.

THE COURT: No, he can ask him what he said to the officers.

THE DEFENDANT: I am asking him what he said to the officers.

A. I told them your color, gave them a description of you, including the scar on the left side of your face. I remember telling them that.

Q. (By the Defendant) Was there anything else you

[fol. 342] told them? A. And I remember telling them that you had a sport coat.

Q. And what else? A. I don't know everything I told them. You have it there, though.

Q. Don't worry about what I have, just try to concentrate on what you told them. A. I wasn't keeping no memory of what I told them. I was just telling them the truth.

Q. And how much money did you tell them was taken at that time? A. I don't remember. I remember about how much, but I don't remember exactly.

Q. I mean the figures that you gave an estimation by. A. He asked me to estimate, and he asked me how much did I think, but I didn't tell him the direct figure.

Q. But you did tell him the amount of money that was supposed to be lost? You did give a statement to that figure? A. Yes.

Q. And what was that statement? A. I don't know. It was between ninety and a hundred dollars. I know it had to be about that, I could tell by the feel of the till.

Q. That is the statement that you gave of approximately the amount of money that was taken? A. I said I didn't know. That is what I gave him at that time, approximately what I felt.

Q. Did you ever give to any officer that night a state-
[fol. 343] ment on the money in the range of approximately 70 to 80 dollars? A. I said, I don't remember what I told him about that.

Q. Did the robber at that time have on a tie? A. I don't remember. I didn't pay any attention.

Q. Did the robber at that time have any kind of grease on his face, Mr. Perry? A. I don't know what he had on his face.

Q. Well, you were looking at his face, you should know. A. Do you have grease on your face now?

Q. Did he have any kind of thick or heavy grease on his face? A. I didn't say that.

Q. I am asking you. I am asking you: Did he?

THE COURT: Just answer his questions, if you would.

A. I don't know if he did. I don't know.

THE COURT: All right. You don't know.

Q. (By the Defendant) Did the robber have any kind of bandage on his face, Mr. Perry? A. No.

Q. Did the robber have any kind of yellow marks on his face, Mr. Perry? A. No.

Q. What color was the robber's eyes, Mr. Perry? A. What do you call "color"? I mean, your eyes, to me, were brown.

Q. What color were the robber's eyes? A. Your eyes, to me, were brown.

Q. I didn't say "my eyes"; I said the "robber's eyes." A. Brown.

[fol. 344] Q. Are you sure they wasn't gray? A. I said, to me, they were brown.

Q. Are you sure they weren't gray? A. I said, to me,—

Q. Mr. Perry— A. Am I sure they wasn't gray? To me, they were brown.

Q. Did the robber have on glasses, Mr. Perry? A. No.

Q. Do you know what contact lens is, Mr. Perry? A. Do I know what they are?

Q. Yes. A. Yes, I know what they are.

Q. Have you ever read anything about contact lenses, Mr. Perry? A. Yes.

Q. Could you tell whether the robber had on contact lenses, Mr. Perry? A. No.

Q. Mr. Perry, did the robber have a goatee? A. I don't remember.

Q. Mr. Perry, before you went to the jail on May the 5th, to view the suspect in the lineup, were you shown any photographs of a suspect? A. No.

Q. When you first looked at the robber that night, Mr. Perry, did he appear drunk to you? A. No.

Q. You made an opening statement, Mr. Perry, that you thought the robber was kidding. What gave you that idea? A. Well, you were so cool; you were so cool, that's the reason.

Q. What do you mean by "cool," Mr. Perry? A. Like you are now.

[fol. 345] Q. That is your definition of "cool," is it, Mr. Perry? A. Cool.

Q. That is your definition of "cool," is it, Mr. Perry? A. Well, I was trying to make it plain to you. It seems like you are trying to play so dumb. What I mean by "cool" is, he wasn't excited or anything.

Q. At the time that you was in this room and you stepped up to the window, had any of the police officers given you any instructions on how to view the suspect? A. Yes.

Q. What was that? A. We were to look straight through this glass and see if we could see the suspect.

Q. And what else? A. That was all. They said, "No talking."

Q. And what else? A. That is all.

Q. And what did he say in case you did see a suspect? What did he say for you to do? A. What do you mean? I told him—I told him when he asked me if I was willing to go out and point to the man, I told him, yes.

Q. At the time that you were looking through this glass, how far was the inspector from you? Was he at the window with you? A. No, I was at the window.

Q. You was at the window alone? Wasn't nobody else at this window but you? A. Looking out, I was the only one looking out the window.

[fol. 346] Q. Was anybody standing as much as a foot to you, especially the inspector? A. I don't think so. I don't remember. I know he had us take a walk up to the window, so I was looking directly out. I didn't look back behind.

Q. Did anybody call off any of the names of the people in the lineup to you as you was viewing the suspects? A. No.

Q. Do you wear glasses, Mr. Perry? A. Do I wear glasses?

Q. Yes. A. Sunglasses.

Q. You don't wear any other kind of glasses? A. No.

Q. And what color shade are the sunglasses? A. You mean the—

Q. I asked you—

THE COURT: Well, if he didn't have them on at the time, it is immaterial.

Q. (By the Defendant) Mr. Perry, did any of the suspects in the lineup with the Defendant have on a sport

coat? A. I don't remember, because as soon as I saw you I knew you were the man who held me up, so I didn't pay any attention to any of the other suspects. I couldn't tell you what either one of the other suspects looked like.

Q. Did any of the suspects have on a vest, Mr. Perry? A. I said, I couldn't even tell you what another one of those suspects looked like.

[fol. 347] Q. This lineup, Mr. Perry, how many of the suspects did you view before you came to the Defendant? A. You were the first one. On my way up to the glass, I saw you.

Q. Well, then, how did you arrive at the number of suspects that were standing on number three, Mr. Perry? A. You were on number three.

Q. I asked you, how did you arrive at that? A. I was looking straight at you.

Q. Are you sure it was number three and not 13 or 23? A. No, number three, I'm sure.

Q. You are sure that it was number three? A. I am sure it was number three.

Q. It wasn't 13, it wasn't 23? A. Number three.

Q. Mr. Perry, when you was viewing the suspects through this glass, did you hear any of the other people that were viewing the suspects say anything? A. No.

Q. What kind of a glass was this you was looking through, do you know? A. What kind of glass?

Q. Yes. A. I don't know what kind of glass it is. It is kind of a glass you look through at the lineup, that's all I know. I don't know what kind of glass it is.

Q. Was it clear glass, dark glass, or what? A. It was clear glass.

Q. Are you sure it is a clear glass? A. It looked like clear glass to me.

[fol. 348] Q. And you are sure that you didn't give the police officer, the night you was giving them a description of the robber and of the amount of the proceeds, amount of money that was taken, are you sure you didn't give them the statement that 70 or 80 dollars was missing? A. I don't remember what I told them. I gave them the report. I don't remember exactly what I told them.

Q. Do you know the name of the officer who had taken that statement? A. No.

Q. What were the first words the robber said to you the night he came in that store where you were at? A. I don't remember what the first words were. I know that he asked me for the money. I know I ignored you the first time, and then I know the next time you said, "Don't jeopardize your life."

And when I saw your actions, and when you had your hand like so (indicating), I saw then you wasn't kidding. I mean, I know that.

Q. Was that the first time you had ever been robbed, Mr. Perry? A. Yes.

Q. Had you ever been on the stand before, Mr. Perry, other than this case? A. Than your case, no.

Q. Mr. Perry, you said the first person that you seen when you went to the window to view the suspects, he was standing right in front of the window; is that right? A. No, I didn't say that. I said, on my way up I could see through the glass and as far as making up my mind, to [fol. 349] try and decide who it was, I saw you, so I didn't have to look any further.

Q. How big was that glass that you were looking through, Mr. Perry, an estimation? A. My estimation, around—let's see—four-by-eight, or four-by-ten, something like that. I don't know.

Q. So, therefore, all of the people in the lineup was not in front of this little glass; is that right, Mr. Perry? A. I want to be sure I understand your question. Ask it again.

THE DEFENDANT: Will you read the question, Mr. Reporter?

(Question read.)

A. Now, I will answer this way: To me, they were all in front of the glass because we were looking straight out. Now, whether you call it in front, I don't know. Everybody was right in front. They were right in front of the door, of the glass that I was looking through.

Q. (By the Defendant) Could you see the entire lineup by looking through this glass, Mr. Perry? A. When you looked through the glass?

Q. Yes. A. Sure.

Q. And at what distance would you have to be that you wouldn't see the entire lineup without looking through this glass, Mr. Perry? A. I don't know what distance you would have to be that you couldn't see the entire lineup.

Q. Mr. Perry, what other description did you give the [fol. 350] police on that night, that night that your place was robbed by the robber? What other description did you give the police? A. I don't remember. He took a report of the description that I gave him. It is in writing, so I'm—

Q. Mr. Perry, where is this store located at that you are employed at? A. Where is what?

Q. Where is this store located at that you are employed at? A. On 17th and Peralta, 1624 Peralta.

Q. Do 16th Street come by this store? A. 16th Street?

Q. Yes. A. No.

Q. How far is 16th Street from this store? A. The next block.

Q. What street comes by this store, Mr. Perry? A. Peralta comes by it. Is that what you mean?

Q. Yes, comes along the front of it and along the side of it. A. Peralta is in front and 17th is on the side of it, 17th is in the back of it.

Q. And you say the robber left and he fled east on 16th Street? A. I didn't say "east."

Q. What did you say? A. I said he turned to the right and went toward 16th Street.

Q. Oh. Mr. Perry, now, in this show-up room, when you was in the back of it, you said that you could look through this glass and see the suspect when you was standing there in the back of it. A. I didn't say that. I said [fol. 351] on my way up I could see you through the glass, on my way up to the window.

Q. Mr. Perry, the night that you reported this incident to the police, did you tell them the robber had a mustache? A. I don't remember. Whatever I said on that report is the way I saw you at the time. I don't remember what I told them.

Q. I am asking you to substantiate, to see if this is true what you said on this report. A. I said I didn't remember.

THE COURT: That is not a question, Mr. Banks.

Q. (By the Defendant) Did you tell the officer, or did you not tell the officer, the night that you was robbed that between 70 and 80 dollars was taken? A. I don't remember exactly what I told him.

Q. Mr. Perry, on direct examination, when you was asked how much money was taken, what was your reply? A. I don't—Look, I don't remember as far as the money was concerned. I do know, if you read the reports, I told them if I see you a hundred years from today, I would know you. I know that.

Q. I'm not asking you that. A. I don't remember about the money, but I remember you.

THE COURT: Just answer the question. If you don't remember, just say so.

Q. (By the Defendant) Mr. Perry, what I am asking you today is: While you was on direct examination you was [fol. 352] asked to give approximately how much money was taken. What was your reply? A. I don't remember how much I told him.

Q. Are you sure you don't remember how much the District Attorney asked you was taken on direct examination? A. I don't remember.

THE COURT: Do you want to restate that, Mr. Banks? I don't think it makes sense.

Q. (By the Defendant) Just what did you say when the District Attorney asked you on direct examination, in your statement as to how much money was missing? A. I don't remember. Whatever it was, I don't remember.

Q. What else did you say to Inspector Zweigle at the time you were in the show-up room at the city police headquarters, Mr. Perry? A. I don't remember what else I said to him.

Q. How long have you worked at the store, Mr. Perry? A. About 12 years.

Q. And who do you work for, Mr. Perry? A. Irving Jacobs.

Q. And what are your hours, Mr. Perry?

THE COURT: Well, these are immaterial, Mr. Banks.

Q. (By the Defendant) On the day that this robbery occurred, what shift was you working? What was your hours on this shift? A. From 7:00 to 2:00.

Q. From 7:00 to 2:00. And what time, Mr. Perry, did this occur? A Did what occur?

Q. This robbery. A. Oh, around between 11:15 and [fol. 353] 11:30, around 11:15, I would say.

Q. Are you sure of the time, Mr. Perry? A. I am sure it was between that time. I said, "about."

THE COURT: Well, we might as well recess until tomorrow.

I will again admonish the jury not to discuss the case among themselves or with onyone else or to form or express any opinion at this time.

We will recess until 10:00 o'clock tomorrow morning.

(THEREUPON, at 4:35 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Thursday, August 2, 1962.)

[fol. 354] THURSDAY, AUGUST 2, 1962
10:00 O'CLOCK A.M.

THE COURT: Stipulated the jury is all present.

Now, let me see. Mr. Perry.

MR. MURPHY: Mr. Perry, I think, was still on cross-examination.

THE COURT: Yes, Mr. Perry was still on cross-examination.

Mr. Perry, the Court will remind you you are still under oath.

All right, Mr. Banks.

ROBERT E. PERRY

previously called as a witness on behalf of the People, resumed the stand and tesified further as follows:

THE DEFENDANT: Your Honor, I would like to make a statement to the Court.

I would like for you to order my witnesses—just my witnesses, is all—to appear Monday at 10:00 o'clock.

THE COURT: Monday? I don't know how many witnesses you have, Mr. Murphy.

MR. MURPHY: I have five or six more.

THE COURT: Yes, I think Monday would be all right.

All right. Would you have the witnesses stand, Mr. Banks.

THE DEFENDANT: All right.

THE COURT: Just these four of them?

[fol. 355] THE DEFENDANT: Yes.

THE COURT: All right. Then you are excused at this time, to report back to this Courtroom at 10:00 a.m., Monday, August 6th, without further order.

CROSS-EXAMINATION—(Resumed)

Q. (By the Defendant) Mr. Perry, did you ever make a statement to the police at the time that you reported this crime on May the 4th, that the robber had a mustache? A. I don't remember.

Q. Did you come to the City Hall the next day, May 5th? A. Yes.

Q. Did you come by yourself? A. To the City Hall?

Q. Yes.

THE WITNESS: Your Honor, may I—

A. I came down to the City Hall by myself, but I didn't come into the City Hall by myself.

Q. And how did you come down to the City Hall, in your car or on the bus? A. Yes, in my car.

Q. At the time, Mr. Perry, when you was taken to the show-up room, how many people was in the group with you? A. I don't remember, see, because there was more people than what was involved in where we were going at the time.

Q. Did you go to this viewing window first, to view the suspects, of your group? Were you the first one of your group to go to this window? A. Yes.

[fol. 356] Q. I will ask you again, Mr. Perry, were you the first one in your group to go to that window? A. To go to the window?

Q. Yes, and view the suspects? A. Go to the window?

Q. The first person to look through the window and view the suspects— A. Yes.

Q. —of your group.

How many police officers were with you in the viewing room, do you know? A. How many police officers?

Q. Yes. A. One.

Q. Yes, how many were with you in this viewing room? A. Do you call an inspector a police officer?

one; is that right? A. He said he wanted to refresh my

Q. Mr. Perry, at this time, what caused you to refreshing your memory that you know you were the first person of your group to look through this window at the suspects?

MR. MURPHY: I object to that as assuming something not in evidence.

THE COURT: Yes, the objection is sustained.

Q. (By the Defendant) Mr. Perry, do you recall ever making a statement, when you was asked that same identical question, that you don't remember? A. What question are you speaking of?

Q. About what number did you look through the window to view the suspects? A. Do I recall?

Q. Yes. A. I don't remember.

Q. I will refresh your memory, Mr. Perry. I would like [fol. 357] for you to read this statement, which is a copy of the transcript which was made of the questions and answers in the Municipal Court, Alameda County, Department 5, before the Honorable Judge Fisher, on the 16th of May. I would like for you to read Lines 25 and 26 on Page 41, and Line 1 on Page 42.

(Witness does same.)

Q. At that time you was examined by counsel on cross-examination, and he asked you the following question:

> "Question: My question is: Were you the first person in the group to look through the mirror or window at the lineup?"

That is Page 41, and the answer is:

> "Answer: I don't remember."

But today you say you remember you were number one; is that right? A. He said he wanted to refresh my memory. I didn't remember at the time, but after thinking it over when I left I do remember that I was the first one.

Q. Mr. Perry, the night the police interviewed, talked with you at the scene of the crime, did you tell the police, or did you give the police an estimation of how much money was missing? A. At the time?

Q. Yes, at the time they talked to you that night at the scene of the crime. A. Yes.

Q. And what was that estimation? A. I don't remember.

Q. And how much do you say now that was taken? [fol. 358] A. I don't know.

Q. Approximately how much was taken? A. I don't know. I don't remember.

Q. Yesterday on cross-examination approximately how much did you say was taken? A. I don't remember saying.

Q. On cross-examination, when I asked you approximately how much was missing, did you make the statement, "Approximately 90 or a hundred dollars was taken"? A. Well, I may have. I made the statement, I know it was near a hundred.

Q. Mr. Perry, I would like to refresh your memory along the lines of the statement taken.

I would like for you to read Page 35 of the same transcript taken in the Municipal Court before Judge Fisher, Department 5. I would like you to read Lines 23, 24, 25, 26 and on Page 36, Lines 1, 2 and 3.

(Witness does same.)

Q. When you was asked on cross-examination the question by counsel for the Defendant:

"Question: Did you tell the police about him, and that he took some money?"

Which is Line 23 on Page 35. Your answer was:

"Answer: Yes, I did."

And on Page 36:

"Question: How much did you tell them that he took?"

[fol. 359] You answered, on Line 26:

"Answer: I told him it was approximately 90 dollars."

A. I was just figuring about the way it felt to me, between the number of fives and tens, and I told him I could not tell him how much.

Q. And on the next question, which is on Line 3, it was asked by cross-examining counsel:

"Question: Would you say it was about 90 dollars?
"Answer: Or more, I told him."

Was that question asked? A. Right. See, I told you we don't keep no more than a hundred dollars or more in the till, and you took all the green, so I was giving you the benefit of the doubt.

Q. So on the night that these police officers interrogated you on how much money the robber had taken from you, did you give the statement: "Ninety dollars, or more"? A. I don't remember what I said. You have it in writing there, whatever I said.

As I say, I was giving you the benefit of the doubt, myself, because I wasn't going to say you took more than what you did, but I know you got that much.

Q. Mr. Perry, did you or did you not tell the officers on the night this robbery occurred, in answer to a question, that the robber had taken 70 or 80 dollars? A. I told [fol. 360] you I don't remember.

Q. In order that you may refresh your memory, I will show you People's Exhibit No. 11 for identification purposes, and I would like for you to read these statements on the back.

(Witness does same.)

Q. Mr. Perry, this is the statement that was take by Officer Ayres, A-y-r-e-s, I think that is his name, Officer Ayres.

MR. MURPHY: Object to counsel stating what the document is. He is not on the stand.

THE COURT: Well, are you going to offer the document into evidence; is that it?

THE DEFENDANT: Oh, yes.

THE COURT: You had better show it to Mr. Shaughnessy first.

THE DEFENDANT: Well, this is People's Exhibit 11.

MR. MURPHY: It is in for identification.
THE COURT: It is in for identification only.
THE DEFENDANT: That's right, it has been identified.

(Discussion off the record between Defendant and Mr. Shaughnessy.)

THE DEFENDANT: Yes, your Honor, it can be offered into evidence.
MR. MURPHY: I have no objection.
THE COURT: All right, Mr. Shaughnessy, have you read the document?
MR. SHAUGHNESSY: I have.
THE COURT: And you advised the Defendant concerning it?
[fol. 361] MR. SHAUGHNESSY: Well, I have discussed the matter with him and proposed to him alternative ways of going about the matter.
One alternative is that he can introduce it into evidence.
THE COURT: All right. The document will be admitted into evidence as Defendant's Exhibit "C."
THE DEFENDANT: This is People's Exhibit No. 11 for identification?
THE COURT: Yes, for identification, but now, if you are offering it into evidence, it becomes your exhibit and you are bound by everything on it.
Do you understand that?
Whatever it says, you are bound by it.
You had better let me take a look at it, Mr. Banks, because if you offer it, you admit the truth of it.

(Defendant hands document to the Court.)

THE COURT: Mr. Shaughnessy, would you come up, please?

(Discussion off the record.)

THE COURT: Exhibit 11 should not be offered by the Defendant.
THE CLERK: The Court rescinds its order?
THE COURT: Yes. So it will remain as Exhibit 11 for identification.

Q. (By the Defendant) Mr. Perry, did you or did you not make a statement to the police officers on the night that they responded to your call that you had [fol. 362] been robbed, that the suspect robbed you of better than 70 or 80 dollars? A. I don't remember if I made that statement or not.

Q. You read the statement, did you not? A. I read the statement, but I didn't remember. I said I didn't remember.

Q. You read your previous statement that you made on the stand in the Municipal Court of Alameda County, did you not, in the City of Oakland? A. I read the statement, yes. I read the statement.

Q. And you remember making that statement, do you not? A. No, I don't remember. I don't remember how much I said. I didn't know, so I couldn't give—I couldn't give them no definite figure, so I didn't know. I don't remember what I said. So the officer asked me, "About how much?" And I told him, "I don't know."

"Well," he said, "give me some figure, about."

So I told him I didn't remember, because I really don't exactly remember how much he took, see?

Q. Did the officer take down any statement that you made that night, in your presence? A. Did he take down any statement?

Q. Yes. A. He took a report of the holdup, if that is what you mean by "statement." I didn't read what he was taking down, if it was the statement I was making or what, but he was writing while I was talking, so you can check to see whatever statement he has to find out [fol. 363] if it was the statement I made or not.

Q. Mr. Perry, when you was going up to this show-up room in the City Hall on May the 5th, was there anybody in that group that you knew other than the inspector? A. That I knew, personally?

Q. Yes. A. I knew the face.

Q. Was there anybody in that group that you had talked to about the robbery suspect? A. Talked to about the robbery suspect?

Q. Yes. A. I don't understand you.

Q. Was there anyone in that group that you had

talked to about a robbery suspect? A. About a robbery suspect?

Q. Yes. A. About a—I mean, I think I understand your question, but before I answer it I want to make sure I know what you want. Ask it again, please.

THE DEFENDANT: Mr. Reporter, will you read that question?

(Question read.)

THE WITNESS: The two customers, the customers that were in the store the night after the robbery, I mean, they were talking about it, we were talking about it, but not that day.

Q. (By the Defendant) But you, personally, did not talk to them about the robber, did you not?

THE COURT: Do you want to restate the question?

Q. (By the Defendant) You, personally, did not talk to the people about the robbery suspect, you, personally?

THE COURT: What people are you referring to?

[fol. 364] THE DEFENDANT: The people that was going up in the elevator with him.

THE WITNESS: That night, I mean, they were in there after you left out, I mean, they were there after the officers came, and we talked about it.

Q. (By the Defendant) No, I am talking about in the elevator or in the City Hall when you were going up to this show-up room. A. Did we talk—

THE COURT: Well, there is no evidence there was anybody else in the elevator.

If you want to ask him who was in the elevator, we will find out.

Q. (By the Defendant) Who was in the elevator with you when you went upstairs? A. I don't remember the names.

Q. Well, how many people was there? A. I don't remember exactly how many was in the elevator.

Q. Was there anybody in this elevator that you knew? A. Not personally, but some that I had seen.

Q. Was there anybody in this elevator that you had seen? A. Yes.

Q. And did you all have a conversation about the robbery? A. What about the robbery?

Q. I said: Did you all have a discussion about the robbery?

MR. MURPHY: Now, this is in the elevator; is that it?

THE DEFENDANT: That's right.

[fol. 365] A. That's right. We didn't have a discussion about the robbery, we were saying—I mean, we were talking about—I mean, I said if I saw the guy again in the next hundred years, I would be able to identify him, because I got a good look at him.

We were that close; he could have reached over and kissed me if he wanted to.

Q. Did you, or any of the people, before you had looked through this window to view the suspects, discuss any of the marks that the robber had on his face? A. I don't remember that.

Q. Did you discuss whether the robber had a beard? A. I don't remember that. I don't remember discussing what he had. I just discussed—I know I said, "I would be able to identify the robber if I would see him again."

Q. Did you all discuss what type of coat the robber had on? A. I don't even remember that.

Q. Did you all discuss whether the robber had gold teeth? A. I don't remember that. I was hot, to tell the truth. I mean, I lost a day's pay, and I've lost one week's pay now.

Q. So, as you say, you was hot? A. Yes. I still am angry. I've lost a week's pay now.

Q. Was this thing going to make you identify anybody that resembled the robber? A. No.

Q. Was this going to affect your judgment in any way? A. No, no.

[fol. 366] Q. As you say, Mr. Perry, there was other people who came into your store after the robber— A. After the robbery.

Q. —had left. A. We stayed open, yes.

Q. Did anybody come in your store during the time of the robbery? A. Yes, I had a customer.

Q. Do you know their names? A. Not directly, no. I think I do, but not directly; no.

Q. Did anybody come in your store as the robber was leaving your store? A. Yes. He liked to knock you down, I guess you should know. The first one ran out and said, "There is a holdup," and the other fellow thought he said, "He is fixing to close up," and he almost knocked you down trying to get in.

Q. I asked you a question. A. Yes.

Q. Mr. Perry, did you talk to the inspector about this holdup? A. Did I talk to him about the holdup?

Q. Yes. A. Now, who was the inspector? Which one you calling the inspector, now? The one that called me or the guy that came down to take the report?

Q. You said that an inspector was in the show-up room with you in your early statement, did you not? A. Yes.

Q. Was the inspector at your place on the night of the robbery? A. I don't know if he was an inspector, he was an officer. I don't know the difference, whether he was an inspector or not. The reason I know the one that came up to the lineup was an inspector was because [fol. 367] he called my house and said he was Inspector—whatever his name was. I mean, that is the reason I know I was supposed to meet them down there.

The other officer just came out when I made the call, and I don't know whether he was the inspector or not. I don't know what his rating was.

Q. Did you talk to this inspector the next day after you arrived at the City Hall? A. Did I talk with him?

Q. Yes. A. Yes. I told him—I was a little late, so I was telling him about my parking spot there, and he said, "That's O.K." I asked him how long it would be, and he said, "That's O.K.," he said, "Go ahead and park there."

I said, "It might cost me $2.00," or something to that effect, referring to the parking meter. I remember that.

Q. But you don't remember talking to him about anything else; is that it? A. No, I didn't say that. I didn't say that.

Q. Do you remember talking to him about the robbery? A. About the robbery?

Q. Yes, about the robbery. A. Not directly so. I remember him talking about they have a lineup, you know,

we were going up to look at a lineup. Directly what was said, I don't remember what the conversation was.

Q. At the time that you was called on May 5th, to come to police headquarters, did they ask you to come down to identify—to see if you could identify the sus-
[fol. 368] pect? A. They called me and they asked me was I Robert Perry, and I told them, "Yes," and they asked me what time could I get down there, they wanted me to go to a lineup. They asked me, "Were you the one working in the store?" And I told them, "Yes."

And when he told me what time I should come down, I told him I would. And he told me he wanted me to view a lineup.

Q. Did they ask you to come down to see if you could identify a suspect? A. A suspect? I don't know. I don't even remember that word. I don't know exactly what the phrase was, but I know they wanted me to look at a line-up. I don't remember exactly what the phrase was.

Q. Do you remember making the statement on cross-examination in the Municipal Court that they asked you to come down to see if you could identify the suspect? A. I said, I don't remember.

THE COURT: We will take the morning recess at this time.

I will again admonish the jury not to discuss the case or form any opinion at this time.

(Morning recess taken.)

PROCEEDINGS IN CHAMBERS OUTSIDE THE PRESENCE OF THE JURY—11:30 A.M.

THE COURT: We are in chambers. The Defendant is present, Mr. Shaughnessy, Mr. Murphy, the Clerk, the Reporter, the Bailiff.

[fol. 369] Mr. Banks, I asked you to come in just so you will understand what the Court was talking to you about on Exhibit 11 for identification.

The Court was not refusing to admit it on the ground it is inadmissible, but—

Do you have it there, Mr. Shaughnessy, a copy of it?

And I couldn't very well point this out without the jury hearing me, that if you offered it in evidence, of course, the jury can read it.

THE DEFENDANT: Yes.

THE COURT: They can take it up in the jury room and read it, and one of the statements on it, and in red, in fact, is as follows:

"Second try for this guy, nailed on third try"—

The next word I don't know, probably "simulated gun."

It also contains the word "robbery" after "Type of Crime," "211 PC, Robbery," "Classification, Armed."

Now, of course, there is no evidence that has been offered that you were armed at the time of the robbery, but your own exhibit would show you armed, plus the fact that I don't imagine on the third try there is going to be much dispute that you were arrested, the police came in and arrested you.

And, from this "second try for this guy, nailed on third try," would connect you then with the other offenses, by your own exhibit.

In other words, it is exactly the same thing as if you [fol. 370] got up and said them yourself.

So, for that reason, I didn't want you to offer this exhibit as your exhibit because, in effect, you vouch for its correctness.

THE DEFENDANT: Oh, I thought the People were going to put that in their own way.

THE COURT: No, this was marked for identification by them so they can get a number on it, so it could be referred to by number.

And whenever it has been referred to here, instead of saying, "This is a report with some red on one side and some pen and ink on the other, and it's got the title of 'so-and' so on it, and I don't find the date here, but I think we know which one I am referring to," instead of going through all that every time, we just say, "Exhibit 11 for identification."

So the People are not vouching for the correctness of this at all. All they wanted done was to have it given a number for identification.

And if you had introduced it into evidence, you would be vouching for it. You would, in effect, be saying, "This is the second try for this guy, he was nailed on the third try, he was armed."

Now, that is why I didn't want you to put it in.

THE DEFENDANT: Yes. O.K.

THE COURT: Now, you have a legal right to offer it, if you want, but it almost amounts to a confession.

THE DEFENDANT: No, I just thought maybe it was [fol. 371] the People's exhibit.

THE COURT: No, no. See, they take no responsibility for it, as long as it is only for identification.

And, of course, if they did offer it, that would still be just like any other evidence they are offering.

THE DEFENDANT: In other words, what you are saying now is, at the end of the People's case they can introduce all of this as evidence?

THE COURT: No. A lot of that stuff isn't admissible by them. These are opinions and conclusions by the policemen.

MR. MURPHY: Actually, the real reason for having him identify it is just to show that these documents existed and the Defendant had access to them.

THE COURT: It was making all the police documents available to the Defendant, yes.

But the person who offers the exhibits into evidence, not for identification, but into evidence, accepts the responsibility for that exhibit and stands behind it.

THE DEFENDANT: O.K. Then I will make a motion to withdraw it from the evidence.

THE COURT: Yes, you can do that. Since there is no problem on it, fine.

MR. SHAUGHNESSY: You are referring to People's Exhibit 11?

THE DEFENDANT: Yes.

THE COURT: People's 11. All right.

MR. SHAUGHNESSY: You can subpoena the police [fol. 372] officer who reportedly made out the People's 11 and question him as to the contents of it, in an effort to impeach Mr. Perry.

You understand that procedure?
THE DEFENDANT: Yes.
THE COURT: All right.

(Thereupon, at 11:40 o'clock a.m., the proceedings in chambers were concluded.)

PROCEEDINGS IN OPEN COURT
11:40 A.M.

THE COURT: Stipulated the jury is all present. All right, Mr. Banks.

CROSS-EXAMINATION (Continued)

Q. (By the Defendant) Mr. Perry, on the night of the robbery, did the robber have a gun? A. I don't know.

Q. Did you see a g ..? A. No. He simulated having one.

Q. Did you see the robber after he robbed your store at any time that night? A. No.

Q. When you and Inspector Zweigle was there in the show-up room, did you make any statement to him? A. Yes.

Q. And what was they? A. He asked did I see the suspect, or something to that effect. He asked me did I see the man that held up, or something like that, and I told him yes.

[fol. 373] Q. But you do not know the exact words of what was said? A. No.

Q. Do you know what your reply were? A. No, I don't remember. The exact words, I don't remember exactly what was said.

Q. Did you ever make the statement to him you wasn't too sure? A. No, I never did make that statement.

Q. Are you sure of that? A. I am sure of that.

Q. I thought you said you didn't remember, a few minutes ago? A. You asked me did I make that statement, and I said, "No", because I was sure since I saw you, that's the reason I couldn't have made that statement.

Q. Can you remember any of the words that you told Inspector Zweigle at that time? A. No.

Q. You can't remember any of them? A. I remember that I remember telling him, "Yes, I saw the suspect. I saw the one that robbed me." I remember that.

Q. But you don't remember the words, "but I am not too sure"? A. I never did use that.

Q. Do you recall making the statement, "Have him to put his hat on"? A. No.

Q. What time, Mr. Perry, did you say this robbery occurred on May 4th? A. That was between 11:15 and 11:30. I don't know exactly what time it was.

Q. Mr. Perry, this inspector that called your home and asked you to come down to see if you could identify the [fol. 374] suspect, was this Inspector Zweigle? A. Zweigle? I don't remember his name. It sounds like the name.

Q. And did he ask you to come down and see if you could identify the suspect, or to view a lineup?

MR. MURPHY: Well, that has been asked and answered several times, your Honor. He is going over and over the same thing.

THE COURT: Well, we didn't have it identified as Inspector Zweigle that asked the question.

THE WITNESS: I didn't understand the question.

THE DEFENDANT: Mr. Reporter, will you read that question?

(Question read.)

A. Just what words, I don't remember exactly the words he used, but I know he said, "The lineup." That was mentioned. I don't remember if the word "suspect," or not was used in this conversation with me, but I know he wanted me to view a lineup.

Q. And you don't know whether you actually come down to see if you could identify this suspect? A. Well, if you consider yourself—Could I identify the man who held me up? I thought that was the only reason he had me down there viewing that.

Q. Do you recall making that statement? A. Making what statement?

Q. "He asked me to come down to see if I could identify the suspect." A. I don't remember. Maybe I did make that statement. I don't know. I don't remember.

Q. Now, I would like you to refresh your memory. I [fol. 375] would like you to read Page 39, from Line 11 to Line 14, of the copy of the transcript that was taken in the Municipal Court in Judge Fisher's Department No. 5, Alameda County. A. What line?

Q. From 11 to 14.

(Witness reads same.)

Q. On Page 39, taken from the transcript which was taken in the Municipal Court in Department 5, Lines 11 to 14, you was asked by cross-examining counsel at that time:

> "Question: I mean, as a visitor?
>
> "Answer: I was not a visitor. I had work to do. I didn't want to come, but they asked me to come down to see if I could identify the suspect. That was the only reason I was there."

A. Keep on reading. Why don't you read the rest of that page?

Q. Did you make that statement? A. If that is what you have there. If it is there, I made it. But how about reading the rest of it?

THE COURT: That is all he has to read.

THE DEFENDANT: That is all I have to read.

Q. And now you say—

THE COURT: This is going to be argumentative. You have asked him if he made the statement, and he has answered it.

Q. (By the Defendant) Did you state a few minutes ago that the officer—

THE COURT: The record will show what he stated a few minutes ago, Mr. Banks.

[fol. 376] Q. (By the Defendant) The inspector asked you to come down and view a lineup; is that right, Mr. Perry? A. I said I didn't remember what words was used. I don't remember actually what words was used. I didn't remember actually what statement I made. I didn't remember saying that I didn't want to come down.

Q. On the night you was robbed, Mr. Perry, did you report to the police that the robber had a mustache? A. I don't remember.

Q. Did the robber, in this particular case, have gold in his mouth? A. I don't remember.

Q. You observed the features of his face and actions very closely, did you not? A. I did.

Q. And as the robber was talking to you, was his mouth open or shut? A. You asked me if you was talking with your mouth open or shut? How can you talk with your mouth shut?

THE COURT: Just answer the question.

A. The mouth was open.

THE COURT: All right.

Q. (By the Defendant) Then after his mouth was open, was it by chance that you would be able to see his teeth? A. If it was by chance, yes, if his mouth was open. By chance I could see his teeth.

Q. Did you see the robber's teeth? A. I didn't pay attention to his teeth.

[fol. 377] Q. Did the robber, on this particular night, talk through his nose? A. I don't know.

THE DEFENDANT: No further questions, your Honor.

THE COURT: All right

MR. MURPHY: I have nothing further of this witness.

THE COURT: All right, the witness is excused. Thank you, Mr. Perry.

(Witness excused.)

THE COURT: We might as well recess.

MR. MURPHY: I have another witness ready, your Honor.

THE COURT: All right. We will recess until 1:30 then, and see if we can get an early start here. So I will again admonish the jury not to discuss the case among themselves or with anyone else or form or express any opinion at this time.

We will recess until 1:30.

(Thereupon, at 11:55 o'clock a.m., a recess was taken until 1:30 o'clock p.m. of the same day.)

[fol. 378] AFTERNOON SESSION
1:30 P.M.

THE COURT: Stipulated the jury is all present.
All right, Mr. Murphy.
MR. MURPHY: Call Mr. Griffith.

GEORGE GRIFFITH,

called as a witness on behalf of the People, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: What is your name, please?
THE WITNESS: George Griffith.
THE CLERK: Thank you. Take the stand, please.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Griffith, calling your attention to the 4th of May of this year, about 11:15 or so in the evening, did you have occasion to be in the vicinity of the Three Point Liquor Store? A. Yes.

Q. On Peralta Street in Oakland? A. Yes, I was.

Q. Did you have occasion to go into that store at that time? A. Yes, I was.

Q. All right. When you went into that store, did anything unusual happen when you were in there? A. Yes. [fol. 379] When I walked into the store, well, that guy (indicating) was standing up with his hand in his pocket, what I thought maybe was a customer, and I went in and ordered me some cigars and a half-pint of whisky to go on home.

Q. By "that guy," do you mean to say there was a person in there who had his hand in his pocket? A. Yes, he had his hand in his pocket, just like that (indicating).

Q. Indicating the right hand in his right coat pocket? A. Yes.

Q. Do you see that person who had his hand in his pocket in the Courtroom today? A. Yes, I see that guy.

Q. Do you see him here today? A. Yes. Sitting over there (indicating).

Q. Will you point to him, just for the record? A. Yes, right there (indicating).

THE COURT: The witness is pointing to the Defendant.

MR. MURPHY: All right.

Q. You can continue with your narrative. A. And when I asked the guy for the cigars and the whisky, and Perry started to move over, he asked Perry, "Do you want to jeopardize your life?"

Q. What? A. He said, "Do you want to jeopardize your life?"

Q. "Jeopardize"? A. Yes, sir; something like that. And Perry come on back and then hit the cash register, [fol. 380] and I started backing up then, and another guy was—walked in the door, and I told the guy, I said, "Man, that guy is holding up the store."

Well, he didn't pay any attention, and by that time he got the money in his left hand and was backing up, and went out the door headed south towards 16th Street, and run through the filling station.

Q. You said the man was "backing up"? A. Yes, when he reached and got the money. Perry laid it on the desk, and he went and got it.

Q. You say Perry laid the money on the counter? A. Yes, and this guy reached and got the money.

Q. What hand did he pick up the money with? A. The left hand, because his right hand was still in his pocket.

Q. Did he ever take his right hand out of his pocket? A. No, he never did.

Q. You say he turned around and walked out facing the door, or backed out? A. He backed out until he got to the door, and then he stepped out, went to the left, down 16th Street, and turned toward the filling station. And Perry asked me to follow him, and I did a piece, but after he got in the dark I was afraid he was going to shoot back at me.

Q. Now, take a look at the picture up here. Do you recognize the scene shown in that picture? A. Yes. He was going back to the left, to 16th Street.

[fol. 381] Q. What is the picture a picture of? A. The Three Point Liquor Store.

MR. MURPHY: All right.

THE COURT: All right. Fine.

Q. (By Mr. Murphy) On that picture, was he going to the right on the picture or to the left on the picture? A. No, he was going to the right. Instead of going to 17th, he was going to 16th Street; walked out of the place like this (indicating) and turned to his left.

Q. Walked through the door to 16th Street? A. Yes, and then cut through the filling station.

Q. Well, just one other thing: Is this the door? A. That is the door, yes.

Q. All right. Did he go in the direction toward the front of that Cadillac in the picture, or in the other direction? A. The other direction, toward the left.

Q. The way the rear end of the car in the picture is pointing? A. Yes, that's correct.

Q. And after he went out the door, did you follow him any distance? A. Oh, I went—Oh, I don't know, about ten feet, I guess.

Perry said, "See which way he went," and I run a little piece. And after he turned the corner, I got afraid. After he got in the dark, I got afraid and I wouldn't follow him any further.

Q. Did he go down as far as 16th Street when you [fol. 382] saw him? A. No, no, he cut between the filling station and—He didn't go all the way to the corner, he cut through a little ways through the filling station; and where he went after he went through the filling station, I don't know which way he went.

Q. All right. Do you know whether he went in an easterly direction? In other words, toward Oakland, downtown Oakland, or toward San Francisco? A. Well, after he turned to the left and ran through that filling station, I don't know. He went toward 16th Street, but where he went then after he got there, I don't know which way he went when he cut through there.

MR. MURPHY: All right. I think that is all I have of this witness.

THE COURT: All right. Mr. Banks?

CROSS-EXAMINATION

Q. (By the Defendant) Your name is Mr. George Griffith; is that right? A. Right.

Q. Where do you live at, Mr. Griffith? A. Where do I live at?

Q. Yes. A. In Oakland.

Q. What is your address? A. 1657 Tenth Street.

Q. Are you employed, Mr. Griffith? A. What?

Q. Are you employed at the present? A. Sure.

Q. What kind of work do you do? A. I work at Burkhart Manufacture on 23rd Avenue.

[fol. 383] Q. What kind of work do you do? A. Make automobile seats.

Q. You say that you was in the Three Point Liquor Store on the night of May 4th? A. Yes, I was.

Q. What time was that? A. Oh, about 11:15.

Q. About what time? A. About 11:15.

Q. Was this robber in the store when you came in? A. Yes, he was standing up at the counter when I walked in. Yes, he was standing up there.

Q. Did you notice anything about this robber being peculiar? A. No, there wasn't nothing peculiar. I thought it was a customer when I walked in the place.

Q. And what did you do when you walked into this place, Mr. Griffith? A. I ordered five cigars and a half-pint of whisky. I was standing right beside you when I walked in the place.

Q. And what else occurred, Mr. Griffith? A. Well, you told the guy, you asked the guy, was he going to jeopardize his life, when he turned around to walk away, walk over there to ge the whisky to wait on me. And he come on back to the cash register then.

Q. And what else happened after that, Mr. Griffith? A. He opened the cash register and handed you the money, laid the money out. You grabbed it in your left hand and backed on out the door, headed toward 16th Street, and cut through the filling station, running.

Q. During the time this happened, did you leave the [fol. 384] store, Mr. Griffith? A. No. I backed up, was starting to back up out the door, and another guy walked

in, and I said, "That man is holding up the liquor store," just like that. And he thought I said, "They are closing up," and he rushed right on in.

You backed right into him, almost, and you bumped right into him running out the door.

Q. Mr. Griffith, while you was in the store, did you have a chance to see the robber's face? A. Sure. I was standing right up beside you.

Q. Did you notice anything about the robber's face? A. Well, you had a scar on your left side, I know, when you turned around when I walked in the door.

Q. And what else did you notice about the robber, Mr. Griffith? A. Nothing but the coat and hat you was wearing.

Q. What kind of coat and hat was the robber wearing? A. The gray coat you had on at the lineup and the same hat.

Q. What kind of coat? A. The gray striped coat.

Q. A gray striped coat? A. Practically like the one you had on, that is about it, the same color.

Q. Was the coat like the one I have on now? A. I didn't say exactly like it, kind of grayish like the one you had on, with stripes in it.

Q. And what color was the hat, Mr. Griffith? A. Kind of grayish, with a rag band around it, rag-looking band, kind of a rag-looking band around it.

[fol. 385] Q. Did you notice anything else about this hat, Mr. Griffith? A. No, I didn't, because I was afraid.

Q. And you say you followed the robber out of the store? A. Yes. After you turned and run, I walked about ten or fifteen steps and you turned around the corner, and Perry asked where you went. And I said you went through the filling station. And he said, "Wait, I'm going to call the law; don't leave, I'm going to call the police.". And I said, "O.K.," and I stayed there until two officers came.

Q. You stayed there until two officers came.

Did you make any statements to these police officers, Mr. Griffith? A. I just told them what I heard you say, that's all.

Q. You didn't make any other statement? Did you identify the robber for these two officers? A. Did I do what?

Q. Identify the robber for these two officers. A. The robber?

Q. Yes. Did you give them a description? A. Well, I told them what you had on, that's all. I told them the hat you had on and the shirt and the coat, and Perry was doing the talking then. I just told them what I heard you say, what I seen you do, and that was it.

Q. What kind of shirt did he have on, Mr. Griffith? A. Oh, kind of—Well, I don't know what color that shirt was—a yellowish-looking shirt.

Q. Did you notice the pants? A. What?

[fol. 386] Q. Did you notice what color the pants were that night? A. No. I was watching your hand in your pocket. That's the biggest thing I was watching. I didn't pay no attention to no pants.

Q. And on that night when the police officers came, you gave them a description of the robber; is that right, Mr. Griffith? A. Perry gave them a description. I told them what you had on, what kind of hat you had on, and what kind of coat, and I told them you had a scar on your left side on your cheek. I told them you had a scar right down on your jaw.

Q. And which way did you indicate that scar run, to the police, Mr. Griffith? A. I said you went to your left, down toward 16th Street, that is where you went.

Q. I say, which way did you tell the police there the scar was on the robber's face? A. I told them it was on the left side.

Q. Yes, but which way, whereabouts on the left side? A. I told them down by your lip, by the corner of your nose.

Q. By the corner of the nose? A. Down by your lip there.

Q. Did you see another scar on the robber's face? A. No, I wasn't looking for that.

Q. How long did you look the robber in the fact, Mr. Griffith? A. About five minutes after you told the guy that you were going to rob the store, and I was watching your hand in your pocket then.

[fol. 387] Q. About five minutes? A. Yes, because I thought you was going to shoot me when I tried to back out of there.

Q. Was the robber in the store, Mr. Griffith, about five minutes? A. Now, I don't know. You was in there when I got there, and I don't know how long you had been in there before I walked in. I don't know how long you had been there, but you was there when I walked in.

Q. The robber stayed in the store about five minutes after you got in there, is that right? A. I don't know. I looked at your face. I don't know how long you stayed in there after you got in there, because I was trying to get out. I didn't want to stay in there.

Q. Did the robber tell you you couldn't leave, Mr. Griffith? A. Why, no, you didn't say nothing to me, because you was watching the cash register when Perry hit the cash register. When I walked up to your side, you told him you was coming there to rob him. And after he hit the cash register, you kept watching him, and I kept backing up.

Q. You said the robber told him he came in to rob him? A. You told the guy that you was going to jeopardize his life, you was going to rob him, it was a stick-up. You raised your coat up with your hand in the pocket, just like that (indicating), and I went to backing up, and another guy walked in the store and you backed up, almost bumped into him, and you turned and run after you got [fol. 388] out of the door.

Q. Mr. Griffith, if you could, I would like for you to just answer the question that I asked you about. A. What do you think I'm doing?

THE COURT: Just limit your answers to the questions.

THE WITNESS: Yes, sir.

Q. (By the Defendant) So there wasn't anyone in the store when you come in but the robber and the clerk; is that right, Mr. Griffith? A. Right.

Q. Mr. Griffith, did you ever see anybody resembling the suspect on the 5th of May? A. No, I wasn't looking for—No, no, I didn't see nobody that resembled you, no, nobody but you.

Q. Did you ever see the Defendant in this case on the 5th of May? A. I didn't understand the question.

Q. Did you see the Defendant in this case on the 5th of May? A. I don't understand what you said now. Did I see—

Q. The Defendant in this case. A. When I come to the—Yes, when I went down to the jailhouse that Saturday in the lineup.

Q. And on the way to the jailhouse, Mr. Griffith,—

Withdraw that question.

Did you come to the jailhouse by yourself, Mr. Griffith? A. No, I didn't. I went down on 14th Street, and the guy brought the five of us down there.

[fol. 389] Q. Was all five of you all going down to this show-up, Mr. Griffith? A. Sure.

Q. On the way down to the City Hall, Mr. Griffith, did you all talk about this robbery which happened the following night, at which you was present? A. Did we talk about it?

Q. Yes. A. No. The guy called me up that Saturday morning to come down there.

Q. Well, on the way, on Saturday morning, down to the jail, did the people in the car talk about—

MR. MURPHY: Well, I will object to that as assuming something not in evidence.

There is no evidence of people being in a car with him.

THE COURT: Well, technically you are right. There is no evidence they went in a car, and there is no evidence that anybody talked, but we will assume they went in a car.

MR. MURPHY: Well, I don't think there is any evidence to that effect. He can ask that question.

THE COURT: He said they went down together.

Did you walk down or did you go in a vehicle?

THE WITNESS: Yes, we walked.

THE COURT: All right.

THE WITNESS: The guy from the police headquarters walked us down.

THE COURT: You walked from the police headquarters on 14th and Clay, about two blocks?

[fol. 390] THE WITNESS: Jefferson, yes.

THE COURT: 14th and Jefferson, yes.

THE WITNESS: He walked us down and then taken us on the elevator.

THE COURT: Yes.

Q. (By the Defendant) And when you arrived at the City Hall, whom did you see, Mr. Griffith? A. In the lineup?

Q. No. Whom did you meet, what policeman?

THE COURT: Now, the lineup is not within the scope of the direct.

Now, if you want to go into the question of when Mr. Griffith saw the Defendant, that is proper; but matters in between would not be.

Now, any inconsistent statements he made at that time or any statements he made at that time would be proper.

Q. (By the Defendant) At the police station, Mr. Griffith, was you escorted to a show-up room? A. Sure. The guy that brought us from Jefferson had taken us up there on the elevator, sure.

Q. And in this show-up room, did it have a window in it? A. Sure, a little, small window about a little wider than that window on the door, sure, where you could look through at the lineup.

Q. Well, approximately how big was this window, Mr. Griffith? A. I didn't measure it. I don't know.

Q. And did you view a lineup from this window, Mr. [fol. 391] Griffith? A. Sure. I looked right in your face, and two guys went up and put their hands on you.

Q. And who else was present in this lineup that you— A. I don't know all the guys' names. Perry was there, and then them two Chinamen guys, and that big tall guy. I don't know all the other guys' names, but Perry and myself.

Q. In what position did you go to the window to view the suspects that was in the lineup, Mr. Griffith? A. I walked up to the window and looked through.

Q. And was you number one, two, three, or four, out of the group that came in? A. Oh, no, I don't know. I don't know whether I was the first or second one. I

don't know exactly. It has been so long that I have forgotten just about everything about it.

Q. And at that time, Mr. Griffith, what else occurred after you had viewed the suspect through this window?

THE COURT: This relates just to the matter of the lineup?

THE DEFENDANT: Yes.

THE COURT: Identification of the suspects?

THE DEFENDANT: Yes.

THE COURT: All right.

THE WITNESS: What happened?

Q. (By the Defendant) Yes. A. I told the guy that brought us up there that you were the one.

Q. Just exactly what did you tell him, Mr. Griffith? A. What did I tell him?

[fol. 392] Q. Yes, just the exact words, if you can remember. A. I told you what I told him.

THE COURT: Do you remember the exact words you used?

THE WITNESS: It has been so long, I don't know. I have had so many things on my mind since then. It has been so long, I can't think of all those things.

THE COURT: In other words, you don't remember exactly?

THE WITNESS: No, not exactly. I mean, I knew it was him, I told the guy, "That is the guy right there." I think there was four or five of them out there. I don't know.

Q. (By the Defendant) What number did you say the suspect was? A. I don't know what number you were standing up by. Now, I don't know what number it was. I didn't pay no attention to the numbers. I was looking at you.

Q. Did you ever recall making a statement, Mr. Griffith, that "He looks like the man"? A. No, I didn't say that. After you put your hat on, I know who you was. After you put your on, I knew, but you were standing up there bareheaded. After you put your hat on, I said, "Yes, that is the man right there with the hat on." Yes, after you put your hat on.

Q. How many people in the lineup did you see with the hat on, Mr. Griffith? A. It wasn't nobody with their hat on but you. That's all I seen.

Q. How many people in the lineup did you see with their coats on, Mr. Griffith? A. Didn't nobody have their [fol. 393] coat on like that one but you. Ain't nobody else have their coat on, because them other guys was young guys.

Q. After viewing this Defendant through the glass in the show-up room, did you have occasion to talk with the inspector? A. No.

Q. That was with you? A. I mean, I guess it was the inspector. I didn't talk with nobody. He told us to come up to the window one at a time. He told us, "You guys stand back and come to the window one at a time."

That is all he said to me. That was it.

Q. And did he ask you could you identify anyone in that lineup? A. Sure, that is what we went up there for.

Q. And what did you tell him? A. You asking the same question over and over again.

THE COURT: Just answer the question.

THE WITNESS: Yes, I told him it was you.

Q. (By the Defendant) Did you make a statement to him that "he looks like the man"? A. After you put your hat on, I told him it was you. Yes, after you put your hat on.

Q. Are you sure that you said, "That is the man"? A. Sure, I am sure I said that.

Q. You didn't say, "He looks like the man," did you? A. I done told you. I told you what I told him.

Q. Did the suspect have—Did the robber in the store, [fol. 394] Mr. Griffith, have a tie on? A. No, you didn't have no tie on.

Q. Was his shirt open? A. I wasn't paying no attention to that. When you was robbing the store, I didn't pay any attention to see if your shirt was open or if you had a tie on or nothing.

Q. Did you notice whether the robber had a mustache, Mr. Griffith? A. Man, I wasn't trying to pay no attention about no mustache. I didn't pay no attention about no mustache, no. I didn't pay no attention. After you

walked in there and you said, "This is a holdup," I was afraid, and I wasn't thinking anything about no mustache.

Q. Did you see anybody else in this lineup on May 5th that had a scar on his face, Mr. Griffith? A. I didn't pay no attention. I didn't look at nobody but you.

THE COURT: Now, Mr. Banks, as I said, we are not interested in the lineup except as to the matter of identification of you, the number of times that the witness claims he has seen you and any statements he made concerning his identification.

The other points are immaterial.

THE DEFENDANT: Your Honor, if you please, I think that the Defendant in this case has the right to cross-examine him as to the discussion, because the identification in this case is involved. And if the people discussed it, quite naturally they will come to the scar.

[fol. 395] THE COURT: I don't think there is any question about the Defendant's right to cross-examination, it has been going on for several days; but the prosecution did not go into the question of the lineup at all.

Therefore, the lineup, as a lineup, is immaterial.

Now, the only thing you can do to test his recollection as to identification is to go into the number of times he has seen you, and any statements he has made that are consistent or inconsistent with the identification.

The first witness we had raised the question of the lineup, so everything concerning the lineup then was within the scope of the cross-examination.

Now, this witness has not mentioned the lineup on direct examination, so—

Q. (By the Defendant) Mr. Griffith, how many times have you seen the Defendant since May the 5th? A. How many times?

Q. Yes. A. I seen you Monday, Tuesday, Wednesday and today is Thursday, and that is too much.

THE COURT: Just answer the number of times, that is sufficient, Mr. Griffith.

THE WITNESS: Yes, I did.

Q. (By the Defendant) How many times, Mr. Griffith, have you seen a photo of the Defendant? A. Seen what?

Q. A picture, photograph of the Defendant. A. I seen [fol. 396] it one time.

Q. And when was this, Mr. Griffith? A. Oh, I don't know exactly the date. I don't know exactly the date. When I come up to his office, I seen your picture then, but I don't know exactly the date, what date it was.

Q. When you came up to the District Attorney's office you seen it? A. Yes.

Q. You were shown a photo of the Defendant, is that right? A. Yes.

Q. And in this photo, what kind of clothes did the Defendant have, Mr. Griffith? A. I didn't pay no attention to the clothes, I just looked at your face. I didn't pay no attention to the clothes.

Q. And at the time that you were shown this picture of the Defendant, did you notice any scars or anything on the Defendant's face in this picture? A. No, I didn't. I didn't pay any attention whatsoever.

Q. In this picture, did the Defendant have a hat on? A. No. I wasn't paying no attention to the hat, I just looked at the face. I didn't know about the hat.

Q. On what day was you shown this picture, Mr. Griffith? A. I don't know the date.

Q. Could you place approximately about the time of the week or month? A. It was in the afternoon, after I got off work at 3:30. I don't know exactly what date it [fol. 397] was, but it was one day after I had gotten off work.

Q. Was it about two weeks ago or three weeks ago? A. Let me see the date this was issued on.

This would make the third week. This week end would make the third week.

THE DEFENDANT: Your Honor, I would like to examine the paper that he had there to refresh his memory from.

THE COURT: Yes, you can examine it.

THE WITNESS: It is nothing but an appeal, that is all that is. It was the third week. That is what date it is. That is all it is. Let me see that for a minute.

Yes, that is the one that says I was supposed to be here on the 16th.

(Witness hands document to the Defendant.)

Q. (By the Defendant) The day you received that, is that the day you was up at the District Attorney's office when he showed you the picture? A. The day I received it?

Q. Yes. A. Yes. I was supposed to be down here that Monday on the 16th, and they called me up and cancelled it.

Q. And looking at this picture, Mr. Griffith, did it refresh your memory? A. Refreshed my memory as to what?

Q. Of the robber. A. No. I seen your face. No, it didn't refresh my memory as to no robbery. I just know it was you when he showed me the picture.

[fol. 398] Q. It didn't refresh your memory of the robber, but it did refresh your memory of the Defendant; is that right, Mr. Griffith? A. Yes. I know it was you when they showed me the picture, but I didn't think of no robber or nothing when he showed me the picture. When he showed me the picture, I said, "Yes, that's the guy that did the robbery."

Q. And looking at this picture, Mr. Griffith, did you notice whether the person in this picture had a tie on or not? A. I didn't pay no attention. I wasn't looking for no tie.

Q. Mr. Griffith, on the night of the robbery, did you notice whether the robber had gold teeth in his mouth? A. I wasn't looking in your mouth, I was looking at your face and your hand in your pocket. No, I wasn't paying no attention. Your mouth wasn't open, I don't guess. I wasn't looking at it.

Q. Did you hear the robber talk that night, Mr. Griffith? A. Sure, I told you what you said. Sure, I heard you talk. You asked the man was he going to jeopardize his life. That's all I heard you say.

Q. And when you heard the robber talk, did you look at his mouth, Mr. Griffith? A. No. I was looking for the man to hand me my package that I ordered. I wasn't looking at you until you said that. Then I started backing out. I wasn't thinking about looking in your mouth.

Q. Did you notice whether the robber had a mustache, [fol. 399] Mr. Griffith? A. You asked me that once, and I told you I didn't pay no attention to no mustache.

Q. Did you notice whether the robber had hair on his lower lip, Mr. Griffith? A. I didn't pay no attention to no lower lip. I told you that in the front.

Q. Mr. Griffith, when the robber left the liquor store, did he run or walk? A. You left running. And turned on 16th Street and cut through the filling station.

Q. And did you follow the robber, Mr. Griffith? A. I told you, I followed you about ten steps, about ten feet, and then you turned through the filling station in the dark and I didn't follow you any further.

Q. In going this ten feet, were you running, Mr. Griffith, or walking? A. I was walking. I wasn't going to run behind you with your hand in your pocket.

Q. Mr. Griffith, could I ask you to keep your counsel and to answer these questions "Yes" or "No"?

THE COURT: Well, some of the questions aren't answerable "Yes" or "No."

Q. (By the Defendant) Mr. Griffith, did the clerk in this store hand the robber the money? A. I told you, he laid the money on the—right down in front of you, and you picked it up with your left hand.

[fol. 400] Q. "Yes" or "No," Mr. Griffith; did the clerk there in the store hand the robber this money?

THE COURT: He answered your question, Mr. Banks.

Q. (By the Defendant) Which hand did the robber pick up this money with? A. Your left hand. Your left hand. You had the right hand in your coat pocket.

THE COURT: That is the third time you asked that, Mr. Banks.

Q. (By the Defendant) Mr. Griffith, did the robber's shirt have a flower on it? A. I didn't pay no attention to no flower, no. I don't know. I didn't pay no attention to no flower.

Q. But you were shown a picture of the Defendant in this case, that is, at the District Attorney's office; is that right, Mr. Griffith?

THE COURT: Now, Mr. Banks, we have been through that for about five to ten minutes.

We know all about it; where he was, what the date was, what kind of clothes were worn, whether a hat was worn.

Now, that has been quite adequately covered.

Q. (By the Defendant) Mr. Griffith, do you always wear glasses? A. Sure. What has that got to do with it?

THE COURT: Just answer the question.

THE WITNESS: Sure, I always wear glasses.

Q. (By the Defendant) Did you wear glasses— A. Sure, I had on glasses.

[fol. 401] Q. —this particular night?

THE COURT: Wait until he finishes the question and then you can answer it.

Q. (By the Defendant) Do you wear sunglasses, Mr. Griffith? A. No, I don't.

Q. Do you take treatments for the eyes, Mr. Griffith? A. No.

Q. Do you use any medication in your eyes, Mr. Griffith? A. What?

Q. Medication. A. No. What do you mean by "medication"? What do you mean?

Q. Do you put in any eye drops, like eye drops, in your eyes? A. No.

Q. How many entrances to this liquor store, Mr. Griffith? A. I don't understand you.

Q. How many entrances to this liquor store? A. I don't understand.

THE COURT: How many entrances to the liquor store?

THE WITNESS: Only one, that is, the front. On Peralta.

Q. (By the Defendant) Mr. Griffith, outside the front of that liquor store, is it well lighted? A. What do you mean by "well lighted"? What do you mean?

Q. Do they have lights out in front of the liquor store? A. Well, I don't know. There is one right at the door, I'm sure.

Q. Is the liquor store, Mr. Griffith, well lighted? A. Sure.

[fol. 402] Q. Can you see all parts of the liquor store, Mr. Griffith, clearly? A. You mean on the inside?

Q. Yes. A. Sure, certainly you could. You could stand at the telephone and look all over the liquor store. It is a small place.

Q. Mr. Griffith, have you been coached in any way on your testimony in this case?

MR. MURPHY: I couldn't hear that.

THE COURT: I couldn't understand it, either. Would you say it again?

THE DEFENDANT: I asked the witness had he been coached in any way on this case.

MR. MURPHY: Had he been what?

THE COURT: Do you understand what he said?

THE WITNESS: You mean, anybody been coaching me?

THE COURT: Yes.

A. Oh, no, I don't have to be coached. They don't coach me. No, they haven't.

Q. (By the Defendant) You are sure of that, Mr. Griffith?

MR. MURPHY: Object to that.

THE COURT: That is argumentative, yes.

THE DEFENDANT: No further questions.

MR. MURPHY: That is all I have.

THE COURT: The witness is excused. Thank you.

(Witness excused.)

MR. MURPHY: See if Mr. Jones is outside.

[fol. 403] May I have just a minute, your Honor?

THE COURT: Yes.

MR. MURPHY: The witness we intend to call will be here in about five minutes, your Honor.

THE COURT: All right.

We will take the afternoon recess at this time, then.

I will again admonish the jury not to discuss the case or form any opinion at this time.

(Afternoon recess taken.)

THE COURT: Stipulated the jury is all present.

MR. MURPHY: Call Mr. Jones.

ROBERT JONES,

called as a witness on behalf of the People, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: Please state your name for the record.
THE WITNESS: Robert Jones.
THE CLERK: Thank you. Take the stand, Mr. Jones.
THE COURT: Mr. Jones, will you keep your voice up so the jury can hear you?
THE WITNESS: All right, sir.
THE COURT: Be seated.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Jones, calling your atten-
[fol. 404] tion to May 4, 1962, at about 11:15 in the evening, did you have occasion to be at the Three Point Liquor Store on Peralta Street, Oakland? A. Yes, I was.

Q. At the time you were at the liquor store, did anything unusual happen? A. Well, the way I happened to be involved in it—

THE COURT: Did anything unusual happen?
THE WITNESS: Oh, yes.
THE COURT: All right.

Q. (By Mr. Murphy) Will you describe what did happen at that time? A. Well, when I walked in the store, a gentleman was walking—backing out with some money in his hand, and one hand in his coat pocket, and he went this way (indicating). He didn't see me when I walked in, because there was another guy come out of the store and was running across the street. And I thought he said they was closing up the liquor store and the store was closing, and I thought I would get me some liquor before the store closed. But he said that they were holding up the liquor store, and I didn't understand it that way or I wouldn't have gone in there.

And I run up in the door and he was backing out with his hand (indicating) up, with the money in it.

Q. You are indicating the left hand? A. That's right. And he had his hand in his pocket, backing up, and he said, "I'm desparate; don't reach for nothing." And in

the meantime he looked back in my face and done like [fol. 405] that (indicating), and that's all I seen.

Q. Do you see the person in the Courtroom who was backing out of the liquor store? A. That looks like him right there (indicating), but he don't have on the same clothes he had on. He had a little sport hat on, kind of old hat. It wasn't no new one. And he had on kind of a sport coat, it was lighter than his trousers was. That's all I could see. I just seen one side of his face when he looked around in my face, you see, and then he fled away.

Q. You pointed to this witness as looking like the man; is that correct? A. He looks like the man.

THE COURT: He pointed at the Defendant.

MR. MURPHY: The Defendant.

THE COURT: Not the witness. The witness has indicated the Defendant.

Q. (By Mr. Murphy) Now, you said that his right hand was in one of his pockets; is that right? A. That is correct.

Q. And you said he had a sport coat on. Was that in the pocket of the sport coat? A. Yes. He had his hand in his sport coat pocket.

Q. Did you ever see his hand come out of his coat pocket? A. No, I didn't see his hand come out.

Q. I show you a coat, which is People's Exhibit No. 20. Does that resemble the coat he had on at that time? A. Yes, it looks something like the coat; yes.

Q. I show you a hat, which is People's Exhibit 21. [fol. 406] Does that resemble the hat he had on at that time? A. That resembles the hat, but it was turned up all the way around, just like that (indicating).

Q. Did you see where this man went after he went out of the liquor store? A. Well, when he went out the door he went back towards 16th Street, that's all I seen.

Q. You didn't see him— A. I didn't know what would happen. I thought, you know, it was—someone was playing with the clerk, with his money, that's all I thought of, because if I knowed it was a holdup I never would have went in there because I could have got killed, you know.

MR. MURPHY: All right. That is all I have of this witness.

THE COURT: Mr. Banks?

CROSS-EXAMINATION

Q. (By the Defendant) Well, Mr. Jones,— A. Yes.

Q. —do you live in Oakland? A. Yes, I live in Oakland.

Q. What is your address? A. I lives in Oakland.

Q. What is your address, Mr. Jones? A. You want to find out my address? What do you want to find out my address for?

Q. Just answer the question. A. 1102 - 14th Street.

Q. Mr. Jones, you said as you were going in the store [fol. 407] the robber was backing out of the store; is that right? A. That's right.

Q. Did you see a gun in the robber's hand? A. A gun?

Q. Yes. A. No. The only thing I seen was his hand in his pocket, sticking up like that (indicating).

Q. Which side of the robber's face did you see, Mr. Jones? A. I seen the right side.

Q. Did you see any scars on the robber's face, Mr. Jones? A. No, I did not, because I only seen one side of his face when he was passing by me, when he was backing up and looked in my face. He was almost up in my arms.

Q. Mr. Jones, you testified a few minutes ago that the Defendant looked like the man that you bumped into; is that right?

THE COURT: Will you answer audibly so the Reporter can take it down?

A. Yes.

Q. (By the Defendant) In other words, you are just not positively sure that the Defendant is that man, are you, Mr. Jones? A. Well, I am positive. His eyes, the little mustache he got across here, and his nose and the clothes, that is the only thing I can go by.

Q. Oh, so you say you had seen now the Defendant's eyes; is that right? A. That's right, I seen them then.

[fol. 408] Q. And you said that the robber had a mustache; is that right? A. Yes, he had a little mustache across here (indicating).

Q. Did he have a beard? A. What? You mean, under here (indicating)? No, I didn't see none.

Q. Did he have a goatee down on his lower lip? A. On the lower lip?

Q. Yes. A. I didn't see that.

Q. Did the robber have on glasses, Mr. Jones? A. No, he did not.

Q. What kind of shirt did the robber wear, Mr. Jones? A. Well, I don't know exactly what kind of shirt he had on, because I just got a slight look at him for just a short period of time when he backed up, when he turned around. The only thing I seen mostly was the money he had in his hand, when he was backing up, and I looked at the money and he turned around and looked in my face, and that's all I seen.

Q. How long did you say that you looked at the robber's face, Mr. Jones, in an estimation of time? A. It is a matter of seconds. I wouldn't say exactly how long, because he was backing out all the time. And when he looked at my face, he just fled away.

Q. In identifying the Defendant, which you have did so today, did you notice anything unusual about the Defendant that the robber did not have? A. Anything unusual?

MR. MURPHY: I object to that as ambiguous.

THE COURT: Well, I think the question is a little [fol. 409] ambiguous, Mr. Banks.

Q. (By the Defendant) Mr. Jones, how many times since May the 4th have you seen a picture of the Defendant? A. How many times?

Q. Yes. Since May 4th, have you seen a picture of the Defendant? A. I think it is one time. Just once.

Q. And when was that, Mr. Jones? A. Oh, I don't just recall the exact date it was, because I had to leave work to come up here. I don't know the exact date what it was.

Q. Was it within the last week, Mr. Jones? A. No. It has been about a week and a half, two weeks, something like that. I don't know exactly.

Q. About a week and a half; is that right? A. Something like that.

Q. How many times since May 4th have you seen the

Defendant, other than being in the Courtroom? A. How many times?

Q. Yes. A. Well, this is about the—Let's see. This is my third time being up in here. It is about four times, I guess, something like that.

Q. You seen the Defendant four times outside of the Courtroom; is that it? A. No.

Q. Well, how many times have you seen the Defendant [fol. 410] outside of the Courtroom? A. One time.

Q. And where was this at, Mr. Jones? A. That has been since May 4th?

Q. Yes. A. Well, I seen you in the lineup.

Q. And where was this lineup held at, Mr. Jones? A. Down there on 14th Street. It must have been May the 5th. I think it was.

Q. And how many people was with you at the time that you seen the Defendant in the lineup? A. I didn't count them.

THE COURT: Now, once again, we are not interested in the lineup as a lineup, but merely the opportunity to see the Defendant.

Q. (By the Defendant) What kind of clothes did the Defendant have on in this lineup, Mr. Jones? A. Well, he had on the same clothes he had on the night of the robbery; the coat, the hat and the dark trousers, a dark pair of trousers.

Q. Did anybody else in this lineup have on—

THE COURT: It wouldn't make any difference. We are not interested in the lineup; just interested in the identification of the Defendant, the number of times he has seen the Defendant.

THE DEFENDANT: Well, your Honor, I think that is material to the evidence to show that—

THE COURT: We are not interested in whether he identified the Defendant at the lineup, we are interested [fol. 411] in how many times he has seen the Defendant because of his identification on May 4th.

Now, do you follow the distinction?.

Also, if he made any statements at the time of the lineup or any other time that are inconsistent with his statements concerning identification, you can go into those.

Q. (By the Defendant) And what kind of coat did the Defendant have on in this lineup, Mr. Jones? A. I beg your pardon?

Q. What kind of coat did the Defendant have on in this lineup, Mr. Jones? A. What kind of coat he had on?

Q. Yes. A. That coat up there (indicating). One just like that, in that box up there.

Q. Oh, he had on one just like that one in that box; is that it? A. That's right.

Q. Did you make an identification of the Defendant in this lineup, Mr. Jones? A. Make a what?

Q. An identification of the Defendant in the lineup.

THE COURT: Do you understand the question?

THE WITNESS: No, I don't.

THE COURT: All right.

Will you rephrase the question, then.

Q. (By the Defendant) Did you identify the Defendant at the lineup? A. That's right.

Q. And what did you say when you identified this Defendant? A. What did I say?

[fol. 412] Q. Yes. A. The only thing I said—When I seen him he had his hat off. Then the police said, "Put your hat on." And I said, "Well, that's the man."

Q. In other words, at that time, Mr. Jones, you couldn't identify the Defendant with the hat off; is that it? A. Well, I wanted to identify him just like he was when I saw him coming out of the store.

Q. Mr. Jones,— A. Yes.

Q. —did you discuss this identification with Inspector Zweigle? A. Did I discuss it with him?

Q. Yes. A. The only thing I said to him was, "I was there."

Q. After the robber left this liquor store, Mr. Jones, did you remain there until the police came? A. That's right.

Q. And did you give any information to the police? A. The information what I gave, the only thing I gave is that you backed up in my arms with the money in your hand and with your other hand in the pocket.

Q. Did the robber, Mr. Jones, back into you? A. He didn't back right up into me, but he backed right close

up into my arms, and when you was backing out, why, you was close enough for me to grab you, but I wouldn't grab you because I thought you was the guy's friend.

Q. Did the robber in this case touch you in any way? A. No, he did not.

[fol. 413] Q. And how close did this robber come to you, Mr. Jones? A. Oh, about a foot and a half.

Q. After viewing the Defendant in the lineup, Mr. Jones, did you notice whether he had gold in his mouth? A. Whether he had gold in his mouth?

Q. Yes. A. No, because he didn't open his mouth.

Q. Did you know whether the robber had gold in his mouth? A. I just answered the question.

Q. No, you answered another question. This is a different question. A. I said you did not open your mouth. How can I see it with your mouth shut?

Q. That was at the lineup, Mr. Jones.

I am now referring to somewhere else. A. Ask me that question about somewhere else, and I will answer it.

Q. I asked you: Did you see any gold in the mouth of the robber? A. No, I did not.

Q. Was you looking at the mouth of the robber when he spoke to you, Mr. Jones? A. When?

Q. At the scene of the robbery. A. He did not speak to me.

Q. Did the robber say anything to you, Mr. Jones? A. Not anything.

Q. At the scene of the robbery? A. Not anything.

Q. Well, who was he talking to then, Mr. Jones, as you [fol. 414] have stated? A. Well, he was talking to the bartender.

Q. When he said, "Don't reach for anything; I'm desperate"? A. He was talking to the bartender.

Q. To the "bartender"? A. That's right.

Q. And who was the "bartender"? A. Oh, I don't know the guy's name.

Q. Was this at a bar or liquor store? A. At a liquor store. Well, he was behind the bar.

Q. And in viewing the picture of the Defendant, Mr. Jones, did you notice whether the Defendant had a scar on his face or not? A. I beg your pardon?

Q. In viewing the picture of the Defendant, did you know whether he had a scar on his face or not? A. I seen one, that's right.

Q. You said, Mr. Jones, that the robber looked you in the face; is that right? A. What did you say now, again?

Q. You said the robber looked you in the face; is that right? A. When he looked back, he looked back like that (indicating), but he fled just that quick, you see. He didn't just stare at me in the face, no.

Q. But in that fleeting glimpse, you say you seen the robber had a mustache; is that right? A. That's right.

Q. And you say that you seen that the robber had a checkered coat; is that right? A. That's right.

Q. And cap; is that right? A. That's right.

Q. Now, Mr. Jones, I direct your attention to the line-[fol. 415] up. After viewing this lineup, did you have any conversation with Inspector Zweigle regarding the robbery? A. No, I did not, not about no robbery; no, sir.

Q. Did you have any conversation with Inspector Zweigle concerning the identity of the Defendant in the lineup? A. When was that?

Q. At the show-up. A. At the show-up? I don't recall whether I did or not.

Q. Did you talk to an inspector when you identified the robber? A. Oh, we was all talking together. I don't know whether I was talking to him directly or not, but we was all talking together, I guess. I don't recall that I talked to him directly.

Q. Was the inspector at the scene of this particular crime on May 4th? A. I don't know what he was, but the guy that called me up to come up there, I don't know if he is an inspector or what he is.

Q. I am talking about that night at the scene of the crime. A. Oh, that night? Well, I know the policeman come up there. I don't know about no inspector. I know the policeman was there. He was the one that come in.

Q. And you did talk to this officer about the robbery; is that right? A. He asked me some questions, and I answered the questions.

Q. Now, then, did you talk to the inspector at the line-

up about the Defendant concerning identification? A. I [fol. 416] don't think I did.

Q. Did you tell anyone at the lineup that the Defendant looked like the robber? A. Sure.

Q. And who was this man? A. Who was the man that I told?

Q. Yes. A. I don't know his name.

Q. Was he a police officer? A. Well, I don't know if he is a police officer or what he was. He didn't have no police clothes on.

Q. At the time that you seen the Defendant, did you tell this man you couldn't identify him without a hat? A. No, I didn't tell him I couldn't identify him. I said I could identify you more with your hat on, because that is the way I seen you. If I had seen you without a hat on, I could identify you.

Q. And when you told the man that, did he have the Defendant and the other suspects to put their hats on? A. That's right.

Q. And how many hats did you see in this lineup?

THE COURT: That is immaterial, Mr. Banks. We have been through that, I don't know how many times.

Now, what the Defendant was wearing, you can go into that.

Q. (By the Defendant) Mr. Jones— A. Yes.

Q. —the picture that you was shown about a week and a half ago—

I withdraw that question, your Honor.

[fol. 417] Q. Who showed you that picture of the Defendant a week and a half ago? A. A week and a half ago?

Q. Yes. A. Let's see. What is his name now? I don't know what the guy's name was.

Q. And where was you shown this picture? Where were you at when they showed you this picture a week and a half ago? A. I was here.

Q. In comparing this picture with the Defendant, with the person that you seen in the lineup, did you recognize him as being one and the same? A. Yes, that's right.

Q. And did this picture help refresh your memory of May the 5th, of the person in the lineup? A. Did it do what?

Q. Help you refresh your memory? A. Freshen it up?

Q. Yes. A. No, it didn't freshen it up at all. I just knew it.

Q. But when you seen this picture, Mr. Jones, did you have a recollection that you had seen the person which this picture was taken from some place else before? A. What do you mean, "some place else before"?

Q. Well, you could have seen him at the show-up, anywhere. A. Oh, no, no.

Q. You didn't see this person that was in the picture at the show-up? A. You mean the lineup?

Q. Yes, lineup or show-up. A. Yes, I seen him at the place that was robbed.

[fol. 418] Q. No. I mean at the lineup. A. Yes. I thought you meant at the show some place. No, I never seen you before, before May 4th. That is the first time I have seen you.

Q. But after seeing this picture, then it refreshed your memory that you had seen a person resemble that picture somewhere else; is that right?

MR. MURPHY: I will object to that as ambiguous and compound.

THE COURT: Well, the witness can answer.

THE WITNESS: Well, I have answered that question once. I answered it once.

THE COURT: Well, did it refresh your recollection or not?

THE WITNESS: No, it didn't refresh my recollection, not at all.

THE COURT: All right.

Q. (By the Defendant) Mr. Jones, would you have been able to pick out the Defendant sitting here in the Courtroom without the aid of that picture? A. You say, would I have did what?

Q. Would you have been able to pick the Defendant out here in the Courtroom without the aid of that picture? A. There was no one in here that looks just like him but him, your Honor.

THE COURT: Well, would you just answer the question.

A. Oh, yes.

Q. (By the Defendant) Mr. Jones,— A. Yes.
[fol. 419] Q. —how many times have you made a statement, to your knowledge, concerning the identification of the Defendant? A. How many times?

Q. Yes. A. You mean today?

Q. No, not today; before today. A. I think it is only twice.

Q. And when was that, Mr. Jones? A. That was May the 5th, and, oh, a couple or two or three weeks ago, something like that, I guess.

Q. You did discuss the identification of the Defendant some week and a half ago; is that right? A. Something like that.

Q. And with whom did you discuss this identification with? A. Well, I don't know his name. I did know his name, but I can't recall his name now.

Q. Was he a District Attorney? A. I guess he was; I don't know.

Q. Did you all go over what the robber looked like? A. What he looked like?

Q. Yes. A. No, we didn't go over what he looked like. He asked me was I there, and I told him, "Yes." He asked me, "How did it happen?" And I told him how it happened. That's all.

Q. Did you remember anything at this discussion that you had forgotten or that you did not report before? A. No.

Q. Of course, you discussed the things you had dis-
[fol. 420] cussed before; is that right? A. Well, some of it, not most of it.

Q. But did you discuss what type of coat the Defendant had on? A. Did I discuss it?

Q. Yes. A. Yes.

Q. With this man? A. Yes.

Q. Did you discuss what type of hat the Defendant had on, with this man? A. That's right.

Q. Did you discuss if the Defendant had a mustache? A. Right.

Q. Did any of this refresh your memory in any way? A. Any of what refresh my memory?

Q. This discussion. A. No, it don't refresh my memory at all.

Q. Did this discussion recall anything that you had forgotten? A. No.

Q. Did this discussion give you any information that you did not know before? A. No, it didn't.

Q. At this meeting with this District Attorney, did you read any notes or descriptions of the Defendant? A. No, I didn't read any. I don't read at all.

Q. Did this man tell you what type of coat the Defendant wore? A. What man?

Q. The man that you had this discussion with on the type of clothes that the Defendant had. A. No.

THE COURT: Will you answer audibly so the Re-
[fol. 421] porter can hear you?

THE WITNESS: No.

Q. (By the Defendant) Mr. Jones, had you been drinking that night? A. No, I had not. I was just fixing to start.

Q. Do you wear glasses? A. No, I don't.

Q. So the only identification you could give this man that you was discussing this with about a week and a half ago is that the Defendant looks like the robber; is that right, Mr. Jones? A. That's right.

THE DEFENDANT: Thank you, Mr. Jones.

I have no further questions.

MR. MURPHY: That is all I have of this witness.

THE COURT: That is all. Thank you.

You are excused.

(Witness excused.)

MR. MURPHY: Mr. Pauletich.

WILLIAM PAULETICH,

called as a witness on behalf of the People, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: State your name for the record, please.

THE WITNESS: William Pauletich.

THE CLERK: Will you spell your last name, please?
THE WITNESS: P-a-u-l-e-t-i-c-h.
[fol. 422] THE CLERK: Thank you.
Take the stand, please.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Pauletich, where are you employed, sir? A. I am self-employed.
Q. And what is the nature of your business? A. Retail liquor.
Q. And where is your place of business located? A. 1051 - 16th Street, Oakland.
Q. Is there a name of that particular place of business? A. Linden Liquors.
Q. Linden Liquors, 1051 - 16th Street, did you say? A. Right.
Q. I show you a picture. Is that a picture of your place of business, Linden Liquors? A. Right.
MR. MURPHY: May that be marked as People's next in order, in evidence?
THE CLERK: 25, your Honor.
THE COURT: Exhibit 25. You are offering it into evidence?
MR. MURPHY: Yes.
THE COURT: All right. 25 in evidence.

(Thereupon, photograph of Linden Liquors was received in evidence and marked as People's Exhibit No. 25.)

Q. (By Mr. Murphy) I am showing you another picture, Mr. Pauletich.
[fol. 423] Do you recognize that picture? A. Yes.
Q. What does that picture depict? The interior of your liquor store? A. Right.
MR. MURPHY: May this be marked as People's next in order?
THE COURT: You are offering it in evidence?
MR. MURPHY: Offering it in evidence.
THE COURT: All right. Exhibit 26 in evidence.

(Thereupon, picture of interior of Linden Liquors was received in evidence and marked as People's Exhibit No. 26.)

Q. (By Mr. Murphy) Now, calling your attention, Mr. Pauletich, to the 4th of May, 1962, about 11:30 in the evening, were you on duty at the liquor store at that time? A. Yes, I was.

Q. Was there anyone else there in your liquor store besides yourself? A. My mother was there. She happened to be there that night.

Q. All right. At about 11:30, did anything unusual happen that night? A. Yes.

Q. Will you describe what that was? A. Well, the fellow came in the store and robbed me.

Q. Do you see that fellow in the Courtroom today? A. Yes, I do.

Q. Will you indicate or point to that person? A. Right there (indicating).

THE COURT: The witness has indicated the Defendant.

Q. (By Mr. Murphy) Now, will you describe exactly [fol. 424] what happened when the man you identified as the Defendant came into your liquor store and, as you say, robbed you? A. That's right.

Q. Well, just explain exactly what happened, what he said and what you said, the whole course of events. A. Well, he come in and he come in up to the counter. I didn't notice too much right at the beginning, because I had two other customers in the store.

Then when he got to the counter, he had his hand in his pocket and pointing it toward me, like he had a gun in there. I presumed it was a gun.

Q. Did he say anything to you at that time? A. Well, he was very calm about everything. He didn't—wasn't threatening or anything, demanding money quickly, or anything like that, but he kind of hesitated for a little while, both of us.

I didn't know what to think of him, because he acted so calm.

Q. Did he say anything to you as he had his hand in his pocket, as you described? A. Well, he pointed over to

the register while he had his hand on top of the counter, and then my mother got up from the chair, which was about six feet away, and she wanted to know what the man wanted.

I said, "Well, he wants the money out of the register."

Q. You said that to your mother? A. Yes.

Q. Well, had the man with his hand in his pocket, had [fol. 425] he said anything to you up to that point, spoke any words to you? A. Well, I think he said, "I want the money." That he wanted money.

Q. And after you said that to your mother, "He wants the money," what happened then? A. Well, there was only one thing to do. She gave him the money. She didn't want to question no gun there in his hand.

Q. All right. Now, where did she get the money? A. Out of the register.

Q. Do you know whether she gave him only currency and coin, or what? A. Only currency. He said he didn't want silver.

Q. Do you know how much money your mother gave him at that time? A. It was about $165.00.

Q. All right. After the man obtained the money, what did he do then? A. Well, he proceeded to go out of the store.

Q. Did you follow him to see where he went? A. No, I didn't go right out. Another customer, by the way, happened to—

THE DEFENDANT: I object, your Honor. If he didn't go right out, he didn't know what somebody else did without it being hearsay.

THE COURT: That's right.

Q. (By Mr. Murphy) You didn't follow him out; is [fol. 426] that right? A. Not immediately, no. I didn't finish my answer. When he was going out, and when he reached the door, another customer come in, your Honor.

THE DEFENDANT: I object, your Honor.

A. (Continuing) They almost bumped.

THE COURT: Where were you at the time?

THE WITNESS: I was still behind the counter.

THE COURT: Behind the counter. All right.

Q. (By Mr. Murphy) And did you see in what direction this man went after he left the liquor store? A. Yes, he went, well, it would be west.

Q. Now, on this diagram of the front of your store, is this door as it appears in that picture on the corner? A. That's right.

Q. And as he came out of that door— A. Well, looking at that picture here, it would be to the right.

Q. In other words, an arrow pointing to the right on the sidewalk would be the direction he went; is that right? A. Well, see where the sidewalk is going? Can I point to it?

Q. Yes, you put a little arrow on the diagram. A. This is the door he ran out of here (indicating), and he went up this way (indicating), and continued on to the next street, which is Chestnut.

Q. In other words, an arrow pointing in that direction (indicating) would be the way he went? A. Right.

Q. I notice there is a window in the front of your store, [fol. 427] as appears in that picture. A. Yes, there are two large windows.

Q. Did you see him as he went by the window? A. Yes.

Q. But you didn't follow him out after that? A. No, not right at that moment; no. I went out a little later.

Q. When you went out a little bit later, did you see the man who had robbed you? A. Well, I seen—Yes, I seen him when he was almost to the next corner. He was going quite rapidly, and then he turned and then disappeared. I don't know where he went after that.

Q. Now, did you have occasion to see this man again after that? A. Yes.

Q. When was the next time you saw him? A. Very shortly thereafter, within a half an hour.

Q. And what was the occasion for you to see him later on that evening? A. Well, the police officers brought him back. He was captured. They got him at the next store that he tried to hold up, I presume.

THE COURT: You can strike that, and the jury is to disregard it.

Q. (By Mr. Murphy) When he was brought back by the police officers, was it the same man that was brought back that had robbed you a short while before? A. Yes. Yes, it was.

[fol. 428] Q. Incidentally, what denominations of money did he obtain from you at the time? A. Well, it was twenty dollars, ten dollars, fives and ones.

Q. Do you remember how many ones he got from you? A. Oh, I know it was about between 30 and 40, I believe, somewhere around between 30 and 40.

Q. Now, as to the clothes the man wore, do you remember what kind of clothes he wore at the time of the robbery? A. Yes.

Q. How would you describe the clothing he wore? A. Well, he had a sport coat on and a hat, and the hat seemed like it had a little feather of some type on one side.

Q. I will show you People's Exhibit No. 20, a sport coat.

Does that resemble the coat the man wore at the time? A. Yes, it does.

Q. All right. And at the time this man was returned by the police, was he wearing the same clothes as when he robbed you? A. Yes.

Q. I show you a hat, People's Exhibit No. 21.

Does that hat resemble the hat the man wore at the time? A. Yes, that's right.

Q. These events happened in the City of Oakland, County of Alameda, State of California? A. Right.

MR. MURPHY: That is all I have of this witness.

THE COURT: All right.

Mr. Banks?

[fol. 429] CROSS-EXAMINATION

Q. (By the Defendant) Mr. Pauletich, is that the way you pronounce your name? A. Pauletich.

Q. Mr. Pauletich, are you a part-owner of this liquor store? A. Yes, I am.

Q. And how much money did you say was missing from this— A. From my records, it was about $165.00.

Q. What did you say? A. $165.00.

Q. And what time did this robbery occur? A. About 11:30, May 4th, and I notified the police.

Q. Did the police come to your store? About what time? A. Shortly after. I don't know, five minutes or so, or ten. I know it was shortly after I phoned.

Q. Did you give the police a statement concerning this robbery? A. What do you mean? A description of the—

Q. Did you give the police a statement concerning this robbery? That includes everything. A. Yes.

Q. And at the time that you reported this, did you give the description of the robber? A. Yes.

Q. And what was that description? A. Well, I told them the fellow was about five eight, or around that height, and about, oh, 150 pounds; something like that.

Q. One hundred fifty pounds? A. Something like that. I told him he was about my size. I wasn't positive as to the height or weight, but I told him, "It was a fellow about my size."

[fol. 430] Q. And what complexion did you give the police of the robber? A. Well, I'm not certain. I think I said,—I think he asked me if he was a colored person, and I said, "Yes."

Q. No. I mean, complexion. Was he dark, light, or— A. I don't remember anything about that.

Q. And what kind of a coat did you give—description of the coat did you give of this robber? A. Well, I told him he had a sport coat and hat and they said it seemed to fit the description of the two previous robberies that were reported to him.

THE COURT: Just the statement that you made, that's all, Mr. Pauletich.

THE WITNESS: All right.

Q. (By the Defendant) And what color pants, trousers, that you gave them, that the robber wore? A. I don't think I gave them any description, because the counter wasn't—I couldn't see through the counter there. I didn't notice the trousers at all. I mainly noticed the hat and the coat and one other mark on the face, it was either a scar or a scratch or something that I noticed while observing him.

Q. What color did you say the hat was? A. Well, I thought it was brown.

Q. When the robber left your store, did he walk or run? A. Pardon?

Q. When the robber left your store, did he walk or run? A. You mean in the store or out of it?

[fol. 431] Q. When he left your store, when he was going out of the door. A. Well, I didn't notice if he run or what. As I say, there was another customer coming in, and the two of you come together almost, almost bumped each other.

Q. And which way did the robber go? A. Well, that was west. Going west, toward Chestnut.

Q. And how much money did you say your mother gave the robber? A. Oh, we figured it out to about $165.00.

Q. And what statement did you give to the police concerning how much money was lost? A. I don't remember that I gave them any figure or not. I'm not sure.

Q. You said a moment ago, on cross-examination, that you noticed the scar. A. Pardon me? What was that?

Q. That you noticed the scar or mark on the robber's face. Is that right? A. Well, I don't know if it was a scar or mark or something.

Q. Did you report this to the police? A. Yes.

Q. Be careful now, Mr. Pauletich. Did you give that statement to the police? A. Yes.

Q. Did the robber have a gun, Mr. Pauletich? A. I'm not sure.

Q. Did you see a gun? A. No.

Q. And how many customers was in the store at that time? A. Two.

Q. Do you know who those two customers were? A. [fol. 432] No, not by name.

Q. Have those two customers been in your store since then? A. Yes.

Q. What kind of shoes did the robber have on? A. I don't know. I didn't pay any attention to his shoes.

Q. Did your mother give the robber this money in her hand, from her hand to his hand? A. Yes, that was the only way she could give it to him, I guess.

Q. Did you know if the robber had a mustache? A. No, I didn't notice that.

Q. What? A. I say, I didn't notice.

Q. Did you notice if the robber had any hair on his lower lip? A. It looked like it, but I am not sure. It looked like there may have been.

Q. But you don't know whether he had a mustache or not; is that it? A. No, I wasn't paying any attention to that.

Q. Well, did he have any hair on the lower part of his chin? A. No.

Q. How old did you say that the robber were in your report to the police? A. Oh, I don't remember.

Q. Did you ever make the statement to anyone concerning the robber that he had on a sport jacket? A. Well, to the police.

Q. What? A. To the police.

Q. You reported to the police that the robber had on [fol. 433] a sport jacket? A. Well, I'm not—Did you say, "jacket," or "coat"?

Q. Yes. A. I think I said, "sport coat." I don't know if there is a difference or not. I think I said, "sport coat."

Q. Have you ever made a statement on the stand under cross-examination that the robber had on a sport jacket? A. I don't remember. I may have. I'm not sure.

Q. When the robber first came into your store, did he talk directly to you? A. Well, I didn't notice when he first came in, as I had two other customers that I was wanting to help. And all I noticed was the hand in the pocket, and it looked like a gun. And I just kept quiet from then on. I didn't talk too much.

Q. What kind of shirt did the robber have on? A. I am not too sure about the shirt, I am more positive of the hat and the coat.

Q. You said the color of the hat was brown? A. That is what I think it was. It looked brown to me. There are many shades of brown nowadays. I don't know, but it was brown, I would say.

Q. Did you know if the hat was a straw hat? A. No, it wasn't a straw hat. No, it wasn't a straw hat. It seemed to be a felt hat.

Q. Did you ever make the statement on the stand under oath that you know the color of the shirt? A. I think I did, yes.

[fol. 434] Q. And at that time, what color did you say the shirt was? A. Well, I thought it was—had a floral pattern to it, but I wasn't too sure. That is the way it seemed to me, but I wasn't too sure.

Q. But it is your statement now you doesn't know what color the shirt was; is that it? A. Pardon?

Q. Your statement now is that you doesn't know what color the shirt was; is that it? A. No, I am not too positive of the shirt, no.

Q. What color did you say the sport jacket were? A. Well, I said, I believe it was gray, sort of gray, grayish color, dark.

Q. Dark gray? A. Well, I don't know. I thought it was gray, sort of a grayish coat.

Q. Is that what color you say it was? A. I don't remember. I think that is what I said. I don't remember.

Q. How tall are you? A. About five eight.

Q. How much do you weight? A. About 160 pounds.

THE COURT: It is immaterial what he weighs.

THE DEFENDANT: Your Honor, I think he said a moment ago on cross-examination that he gave the statement to the police that the robber was about his size.

THE COURT: All right, then, you can go into it.

THE DEFENDANT: What did you say?

THE COURT: Yes, you can go into it.

[fol. 435] THE DEFENDANT: O.K., thank you.

Q. How much do you weigh? A. Between 160 and 165, it varies. Sometimes I weigh more.

Q. And the robber was about your size? A. Well, that is what I estimated at that time, yes. I think they wanted a more or less closer description, whether he was six-foot or whether he was five six. So I said, "About my size." That is as near as I could give them to the physical description.

Q. I would like for you to stop and think a little bit, Mr. Pauletich, before you answer this next question.

How much money did you say the robber had taken from your place when you reported it to the police? A. I would say $165.00.

Q. Do you ever recall making a statement to the police that night? A. About what?

Q. About the loss of money which was taken from your place, was in the approximate neighborhood of $175.00 or $200.00? A. I don't remember if it was that night or the next night.

Pardon me?

Q. Was approximately in the neighborhood of $175.00 to $200.00? A. I don't remember that.

Q. You don't remember making that statement? A. No.

Q. After this robbery had been committed and you had called the police, did you have occasion to see the Defendant again that particular night? A. That night?

[fol. 436] Q. Yes. A. You mean, again?

Q. Yes. A. Well, it would be the next day, because it was after 12:00 o'clock.

Q. Was it dark outside or light? A. It was dark, naturally, after midnight.

Q. Well, how long after this robbery was committed before you seen the Defendant in this case? A. About a half an hour. Less than a half an hour, I think it was.

Q. And where was this? A. The police officers brought you back in the store.

Q. When he came into your store, did he come into your store in the front of two police officers? A. What is that?

Q. Was he in front of two police officers? A. Well, it looked like everyone was side by side. One officer had you by one hand and the other officer had you by the other hand, and they brought you in, all in a line.

Q. And where were you when the police officers brought the Defendant into your store? A. I was behind the counter.

Q. And what did you say to him? A. I said, "That is the man."

Q. When they brought him in the store, you was behind the counter, and you said, "That is the man"; is that right? A. Well, when they brought you in, I come closer [fol. 437] toward the end of the counter so I could see better, and they asked me if this was the man, and I said, "Yes, that's him."

Q. Did you come from behind the counter and talk to the police officers, first? A. Yes, I went around the counter to get out closer to them.

Q. And after talking to the police officers, did you not look at the Defendant? A. Yes, I looked at him, certainly.

Q. And when the police officers said, "Do that look like the man?", what did you say? A. I said, "Yes, that is him."

Q. And how long had the Defendant been in your store when you made that statement? Was it one minute, two minutes, three minutes or five minutes? A. I didn't look at no watch to see how long it was. It was just a matter of a moment or so. They brought you in and said, "Is this the man?" And I said, "Yes." I wasn't looking at no watch.

Q. But did he talk to you before you made that identification? A. Who?

Q. The police officer. A. Talk to me before?

Q. Did he talk to you first before you identified the suspect? A. Which officer? There were several officers.

Q. Police officer. A. Well, there were several that night there. I don't know who you are talking about. Which police officer?

Q. Well, the one that brought the suspect in. A. There [fol. 438] were two officers. Which one are you talking about?

Q. Did one of the police officers that brought the suspect in talk to you first? A. Yes. They come in and said, "Is this the man?" And I said, "Yes." That is all I remember.

Q. You didn't have any conversation with the police officers before you identified the Defendant; is that right? A. With the two that brought you in?

Q. Yes. A. Not that I remember. I said there were several officers there. I don't quite know who I was talking to by name, or what. I know there were quite a few officers in that evening for this thing.

Q. Was the Defendant in your store at that time? Was he the only one in there that had on civilian clothes, not a uniform? A. I don't remember. I think there was some other customers in the store.

Q. What called your attention to the Defendant being in your store? A. You mean, with the police?

Q. With the two police officers, yes. A. Well, it was such a short time after, and he had the same clothes, same hat and same coat, I couldn't help but see it was the same person.

Q. Was both of these officers that brought the Defendant into your store Caucasian? A. Yes.

Q. How long did they—How long did the police officers [fol. 439] and the Defendant stay in your store? A. Which ones?

Q. The police officers and the Defendant; the two officers that brought the Defendant, and the Defendant. A. How long did they stay?

Q. Yes. A. It was a very short time.

Q. When the Defendant was brought to your store by these two officers, did you make the statement to one of these officers, after conversing with him a few minutes, that the Defendant looked like the robber? A. I didn't say you looked like him. When they brought him in, I said, "That is him. That is the one." I didn't say it looked like him.

Q. At the time your store was robbed, did the robber make any other statement, other than "Give me the money"? A. Yes, he made a statement. As I said before, he acted calm, he was very calm. And I was taking a few steps one way and a few another way, and you said, "Go ahead and press the button and notify the cops, if you want."

He was very calm about everything. He didn't look like he was in a hurry.

Q. No. I asked, did the robber make any other statement? A. That's all.

Q. When he was in your store? A. That's all. I don't remember any other statement, no.

Q. But do you remember yourself giving a statement that the robber did make another statement? A. I don't remember.

[fol. 440] Q. All right. Do you remember stating to the police on the night that the robbery occurred that you

heard the robber say, "Go ahead and call the cops"? A. I don't remember if I said anything like that, no.

Q. Which hand did your mother put the money in when she handed it to the robber? A. I am not sure, but I believe it was the right hand. I didn't notice which hand.

Q. You believe it was the right hand? A. I think so.

Q. Then he had taken his right hand out of his pocket? A. Wait. Maybe I didn't understand you correctly. What was that? My mother's hand or your hand?

Q. Into the robber's hand; which hand did she put the money into the robber's hand? A. Which hand? It was the left hand. You had your right hand in your pocket all the time on top of the counter. It looked like a gun.

Q. The night that your store was robbed, did the robber have a sport coat on, a sport jacket? A. I have answered that once.

Q. And a hat? A. I have answered that several times already.

THE COURT: Now, are you using the words "sport coat" and "sport jacket" for different items?

THE DEFENDANT: I am, for different items.

THE COURT: Is there a difference in the way you [fol. 441] use the words, between a "sport coat" and a "sport jacket"?

THE WITNESS: Well, I don't know. A sport coat, to me, it is not a suit coat; in other words, it doesn't match the trousers.

THE COURT: What are you wearing, a sport—

THE WITNESS: I would say a sport coat.

THE COURT: You would not say a sport jacket?

THE WITNESS: Well, I never had occasion to come that close to identifying a coat and a jacket. To me, it is a coat, a sport coat. That's all I know about it.

THE COURT: When you use the word "jacket," you are referring to a different type of article?

THE WITNESS: A jacket, to me, is a shorter garment.

THE COURT: Shorter, all right.

Q. (By the Defendant) On the night that your store was robbed, did the robber have on a sport jacket, a sport coat and a hat? A. I have answered that already several

times. I said a sport coat and a hat. How many more times do I have to tell you?

THE COURT: Well, this apparently is—He apparently had on a jacket, coat and a hat. Did he have all three items on?

THE WITNESS: He had the sport coat on and the hat.

Is that what you asked me?

THE DEFENDANT: Yes.

THE COURT: Just the coat and a hat?

THE WITNESS: Yes.

[fol. 442] Q. (By the Defendant) I would like to refresh your memory here, on Page 49, on Lines 13 and 14, from the transcript of the Municipal Court, Department 5, Judge Fisher, presiding.

Would you read both Lines 13 and 14 on Page 49?

(Witness does same.)

Q. As you was questioned at that time by the examining counsel on cross-examination, the question was asked of you:

> "Question: How was the robber dressed that night?
>
> "Answer: Well, he had a sport coat—sport jacket, sport coat and a hat."

A. You mean, you wore all three at one time; two coats at one time? I said that?

Q. You were making the statement, not me. A. You mean, that I said you wore a sport coat and sport jacket at the same time?

Q. That is what is in the record. A. I don't think I said that.

Q. That is what is in the record.

MR. MURPHY: Object to what counsel said is in the record.

THE COURT: Yes, the record will speak for itself.

THE DEFENDANT: That's right, the record will speak for itself.

THE WITNESS: I didn't say you were wearing both at the same time. I may have said "sport coat" or "sport jacket."

Q. (By the Defendant) What type of shirt did the [fol. 443] Defendant have on? A. Well, I said I wasn't sure about the shirt. I am not too sure about the shirt. I'm not positive.

Q. Have you stated that he had on a flowered shirt, or flowered pattern shirt? A. I thought it was a flower-type of shirt, but I could have been wrong. That is what I thought. I am not sure what it was, whether it was that or not. There wasn't too much of the shirt exposed, I don't think.

Q. Did you notice any other scars on the robber's face that night? A. No.

Q. Did you see where the robber put the money when he left the store? A. No.

Q. Do you know if the robber put the money in his pocket? A. I don't know.

Q. Do you know if the robber kept the money in his hand? A. I don't know.

Q. When he left your store? A. I didn't notice any of those questions you are asking me. I don't remember those.

Q. Well, I would like to refresh your memory again. I would like for you to read on Page 50 of the transcript of the Municipal Court, while you were on the witness stand, Lines 10, 11 and 12.

(Witness does same.)

Q. You was asked this question by examining counsel [fol. 444] at that time, on Line 9:

> "Question: Did you see how the man put it on his person?
>
> "Answer: No, I didn't notice that. From what I know from other customers, he just had it in his hand and walked out with it in his hand."

Did you make that statement? A. I may have. I don't remember.

Q. Have you ever seen a picture, a photograph, of the Defendant at any time since May the 5th until the present date? A. I don't think so. I don't remember. I don't recall seeing any.

Q. You don't recall seeing a picture, a photograph of the Defendant? A. No, I don't recall . I don't remember.

Q. And you still do not recall making the statement to the police about the approximate loss of the money taken from your place during the robbery? A. At a future date, I think I did; yes. I think they were down several times, inquiring about different things. I think maybe at one of those different times I may have told them.

Q. How many times did you give a statement to the police? A. I don't remember how many times.

Q. Concerning how much money was lost? A. I don't remember how many times.

[fol. 445] Q. During the night of the robbery? A. I don't remember how many times.

Q. But you did give them approximately the figure of the amount of money that was lost; is that right? A. I believe so. I'm not certain. I believe they did ask. They asked a lot of questions, and I presume that that was—must have been one of their questions they asked. I don't remember all the questions that they asked. I can't remember that far back everything that took place.

There were a lot of minor details, and I don't remember everything. I remember most of the main things.

Q. When the Defendant was brought into your store after the robbery, what type of hat did he have on? A. He had the same hat and same coat as when he left the store.

Q. You said that the hat that the robber wore was brown; is that right? A. Well, it was a dark, dark type of hat. I don't know the exact color, but it was a dark type of hat.

Q. But at that time you made the statement that the hat was brown; is that right? A. I believe I did, yes. It looked that way at that particular time. It was a dark hat, I know.

Q. And the Defendant's hat in this case, what color is it? A. Well, it is a dark hat.

Q. But is it brown? A. Well, I wouldn't say—There are many shades of brown. I don't know if that could be [fol. 446] classed as some shade of brown. I don't know.

Q. Did the robber have a tie on? A. I don't remember.

Q. Did he have his shirt open at the top? A. I don't remember that.

Q. How many minutes after the robbery was it before you left the store? A. I didn't understand you. What was that, again?

Q. How many minutes after the robbery had occurred before you left your store? A. You mean when the store was closed, finally closed for the night?

Q. No. After the robber had left. A. Oh, how long? It was shortly after. Well, I didn't finish the story.

When you left the store and this other customer came in that you almost bumped into, I asked this customer, I said, "Watch where that fellow goes." And then I went out and I seen you going up to the corner.

Q. Why did you ask this man to see where the robber goes, when you was following the robber, yourself? A. I wasn't following the robber at that particular moment.

Q. But you did leave the store behind the robber? A. After that little while, yes. After I thought that it was safe to do so. I didn't want to go immediately out there, maybe I might have got shot.

Q. Why? Did you see any gun? A. No. I have stated that before, I had seen no gun.

[fol. 447] Q. Well, why were you afraid to leave the store? A. Well, when you had your hand in your pocket like this (indicating), I thought it was a gun. I wasn't doubting anything or questioning whether it was a gun or not. I presumed it was a gun.

Q. But some minutes later you did leave your store? A. Yes. I just went out of the door.

Q. Was it approximately five minutes, or three minutes, or— A. I didn't count the time.

Q. Approximately? A. It was very shortly, yes.

Q. You can give us an approximate of how many minutes it was. A. It was approximately two minutes, or five minutes, perhaps it was five minutes, less than five minutes' time. Yes, it was less than that. It was right after that happened.

Q. And you say you seen the robber further down the street; is that right? A. After I went out of the door, yes.

Q. And which way did the robber go then? Did he

continue straight down the street or go into a house? A. I told you that once before. He went west toward Chestnut.

Q. When you went back in your store, the robber was still going down the street, west; is that it? A. No. I watched until he turned the corner and disappeared.

Q. How could you tell he turned the corner? A. I seen it. I seen it.

Q. From where you were standing could he have went [fol. 448] in a house? A. He could have, but I don't think that this particular person did, because he was running, going quite rapidly.

Q. Or he could have went in between two houses; isn't that possible? A. Well, anything is possible. Yes, he could have. Well, the other customer that come in the store at the same time that you left, he seen it all.

Q. Yes, but I am only asking you what you saw. A. O.K.

Q. That is what we are trying to get here, the things that you seen that happened. Did this hat that the robber had on, did it have a feather in it? A. Yes.

Q. Did you see a feather in it that night? A. Yes.

Q. Do you wear glasses? A. Pardon?

Q. Do you wear glasses? A. Sometimes.

Q. Did you have glasses on this particular night? A. No.

Q. Do you take any kind of—

I will withdraw that question.

Do you use any kind of medication on the eyes? A. When it is necessary, if it ever becomes necessary. In case of an injury, or something like that, if I go to a doctor and it is required, yes, I would.

Q. But you don't use any other kind of medication? A. No.

Q. Like eye wash and eye drops? A. Oh, if I get [fol. 449] something in my eye, maybe at the time, yes, I would try to wash it out.

Q. I see. Do you ever recall making a statement on the stand that you could positively state the amount of money that was taken from your store on the night of the robbery? A. Well, according to my records, that is what it showed.

Q. But, a while ago, when I asked you on cross-examination, did you or did you not state that it was approximately $165.00 taken? A. Yes, that was the figure that I arrived at; yes.

Q. In other words, you wasn't sure of the amount of money that was taken from your store; is that right? A. Not right at that moment, no.

Q. But you are positive now that $165.00 was taken from your store; is that right? A. Yes.

Q. And now, did you say a while ago approximately $165.00 was taken from your store; is that right? A. Well, I may have said that, yes.

Q. These Federal Reserve bank notes, which your mother handed to the robber, what denominations was they? A. Twenty dollars, ten dollars, fives and ones.

Q. Have you ever discussed this particular case with Inspector Zweigle? A. With who?

Q. Inspector Zweigle, an investigator for the District Attorney's office. A. Well, when I was given a subpoena—

MR. MURPHY: This is a misstatement of facts, I'm afraid.

[fol. 450] THE COURT: Assuming a fact not in evidence. Inspector Zweigle is with the Oakland Police Department, Mr. Banks.

THE DEFENDANT: What did you say, your Honor?

THE COURT: Inspector Zweigle is with the Oakland Police Department.

THE DEFENDANT: Well, I was just relying on the information that he gave me, Your Honor.

Q. Did you discuss this case with Inspector Zweigle of the Oakland Police Department? A. I discussed it with the policemen and the inspectors in their regular course of business.

THE COURT: Do you know Inspector Zweigle?

THE WITNESS: Pardon?

THE COURT: Do you know Inspector Zweigle?

THE WITNESS: Well, there are several inspectors. I don't know them all by name.

THE COURT: Do you know Inspector Zweigle?

THE WITNESS: I don't think I do, no.

THE COURT: Then you don't know whether you discussed it with him or not?

THE WITNESS: No, I don't know whether it was him or not, that I know of.

THE COURT: All right.

Q. (By the Defendant) Did you at any time in the past, within the last three months, discuss this case with an inspector of the police department of Oakland? A. [fol. 451] Yes, at the time they come down to take the picture of the store.

Q. Did he show you a picture of the Defendant at that time? A. I don't remember. No, I don't think so.

Q. Did you go over any part of your statement that you had previously made with him at that time? A. No, I don't remember.

Q. Who all was on duty in your store the night that it was robbed? A. Pardon?

Q. Who all was on duty in your store the night that it was robbed? A. I was on duty.

Q. Was anybody else on duty with you? A. Well my mother was in the store.

Q. Did you or did you not say on cross-examination that you did not know whether the Defendant had a beard or mustache? A. I don't remember saying that he had either one. No, I don't remember that.

Q. Did the robber in your store that night have a mustache? A. I don't remember if he did or not. He may have. I am not sure.

Q. What did you say? A. I am not sure. I don't remember.

Q. After the robber had left your store and you had went out in front of the store, how long was it before the police arrived? A. As I said, it was within a half-hour's time. I am not exactly sure of the exact time. [fol. 452] Within a half an hour, I would say; 20 minutes.

Q. The police arrived within a half an hour after the robber had left; is that right? A. Well, within that time, I would say. Less than that time.

Q. And when they arrived, did you give them a statement that a robbery had taken place? A. To those two officers?

Q. Yes, the police, after the robber had left and you had went out of your store? A. They knew I was robbed.

Q. And the police came there about a half an hour later, and you told them that you had been robbed? A. I presumed they knew it.

Q. What? A. I presumed that they knew it. There were several officers down there that night, I don't know how many, maybe five or six, I'm not sure. I presumed they knew it and understood what had happened. And then when they brought the Defendant back, they asked me if this was him and I said, "Yes."

Q. No. I am speaking about the first police that arrived there after the robbery. I didn't ask about the police that was bringing the Defendant back. I say, after the robber had left, you had went outside of the store, and how long was it before the police arrived? A. They were already there. I don't quite understand what you are trying to—

THE COURT: You are referring to the first time the [fol. 453] police came to the store after the robbery?

THE DEFENDANT: That's right.

THE WITNESS: The first time? Well, I stated they had come shortly after I had made the phone call, perhaps five or ten minutes. I am not positive of the time. I know it was shortly after I phoned.

Q. (By the Defendant) Were you outside of the store or in the store when the police first arrived? A. Inside the store.

Q. And when the police brought the Defendant into your store that night after the robbery, did he have on a sport coat, sport jacket? A. I stated that.

Q. And a hat? A. Yes, I have stated that several times already, a sport coat and a sport hat, a hat.

Q. Now, listen to this question carefully.

Did the Defendant, when the police brought him back to your store, did he have on a sport coat, a sport jacket and a hat? A. He had a sport coat.

Q. Yes, and a sport jacket? A. My interpretation of a sport coat.

Q. Yes, a sport jacket and a hat? A. Well, I am a bit confused, I guess, about a sport coat and a sport jacket.

THE COURT: Did he have on a coat and a jacket and a hat?

THE WITNESS: He only had one, and I said "a coat." Now, maybe he refers to it as a jacket.

[fol. 454] THE COURT: Don't worry about that. You are having enough trouble yourself. You just worry about what you refer to it as.

THE WITNESS: A coat.

THE COURT: All right, fine.

THE WITNESS: I think. Maybe they are referred to at times as the same type of garment.

Q. (By the Defendant) Did the Defendant, when the police brought him back in your store, did he have on a sport coat, a sport jacket and a hat?

MR. MURPHY: That has been asked and answered. This is about the third or fourth time.

THE WITNESS: I don't know how I can explain it. Maybe I am not explaining myself enough. I don't know what you want.

THE COURT: It has been asked about six times, and we haven't got the same answer twice.

THE DEFENDANT: That's right, we haven't.

THE WITNESS: Sport coat and a hat. Now, what other answer have I omitted?

Q. (By the Defendant) The sport jacket. A. Well, he wasn't wearing two garments. Is that what you are trying to ask me, if he had two garments on at the same time, a sport coat and a sport jacket?

Q. You have made the statement on the stand that he had on a sport coat, in one statement, a sport jacket and a hat. A. Well, maybe it was interpreted wrong.

MR. MURPHY: Object to that as a misstatement of [fol. 455] the evidence. He didn't testify to that at all.

THE COURT: Well, it depends on how the sentence is punctuated as to whether he did or not, and he probably didn't testify to punctuation, so we will never know.

We will recess until tomorrow morning. I was hoping we would finish with this witness this afternoon.

So we will recess until 10:00 a.m. tomorrow.

I will again admonish the jury not to discuss the case among themselves or with anyone else or to form or express any opinion at this time.

(Whereupon, at 4:45 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Friday, August 3, 1962.)

[fol. 456] FRIDAY, AUGUST 3, 1962
10:20 O'CLOCK A.M.

PROCEEDINGS IN CHAMBERS OUTSIDE THE PRESENCE OF THE JURY
10:20 A.M.

THE COURT: All right, we are in chambers. Mr. Banks, Mr. Shaughnessy, Mr. Murphy, the Clerk, the Reporter, Bailiff are present.

All right, Mr. Banks.

THE DEFENDANT: Your Honor, I would like to make a motion to call three witnesses. These are new witnesses.

THE COURT: Yes.

THE DEFENDANT: Mr. R. Ticksman of the Oakland Police Department, 5583P is his badge number; and Mr. D. Ayres, I think it is A-y-r-e-s, badge number 5024P; and an expert witness, Professor Paul L. Kirk, University of California, Berkeley.

THE COURT: On what?

THE DEFENDANT: What did you say?

THE COURT: What is he an expert on?

THE DEFENDANT: I want him to go into identification, expert opinion on identification, which is playing an important factor in this case.

THE COURT: Well, what phase of identification? We have had very little physical evidence introduced, [fol. 457] with the exception of photographs.

You are not referring to the photographs?

THE DEFENDANT: No, I am talking about referring to the mind and work of the human mind concerning identification, which he is an expert in the terminology of different workings of the human mind of seeing objects and identifying them and why, the reason for it.

THE COURT: Well, I don't see any need for an expert in the light of the testimony of the witnesses so far.

All we are talking about, of course, is just up to what we have heard so far.

The witnesses have just reiterated what they have observed with their own eyes and with their own ears.

THE DEFENDANT: That's right. You see, in this case, I am claiming—taking the assumption that their identification is mistaken identification.

THE COURT: Yes.

THE DEFENDANT: Well, an expert can plainy explain the reason why there is people that mistake people for other people.

See, they have a term for that. I doesn't remember just the exact term they use for that, but they have a term for why that occur so often.

THE COURT: Well, this is just a question, basically, of whether the jury—and we are talking about what has happened so far in the case, I don't know what is going to happen today or in the future—but it is just a question [fol. 458] that is up for the jury to determine whether or not they wish to believe the witnesses.

THE DEFENDANT: That's right. But with the full explanation of why a person identified another one, when he wasn't there, why did any person identify people for people they think they knew and it turned out later that they are not even the person that they think they knew, that has happened in a number of cases.

THE COURT: I don't see any need for an expert witness in this.

Now, if you want to subpoena him, you can subpoena anyone who knows anything about the case, but you are asking that Dr. Kirk be subpoenaed and paid by the County.

THE DEFENDANT: For expert testimony.

THE COURT: I don't see that we need expert testimony when the witnesses have just related what they have seen.

Now, the other two, this is a matter where you can give the names to Mr. Shaughnessy and he can subpoena them.

It is not necessary for the Court to subpoena them. They are both local officers, and Mr. Shaughnessy will see that they are here for you when you want them.

MR. SHAUGHNESSY: I was going to ask, your Honor: Our office would request that if it is agreeable with the Court the Clerk issue the subpoenas for these two gentlemen, and that the Sheriff of the County serve them.

THE COURT: All right.

MR. SHAUGHNESSY: Incidentally, do you have the [fol. 459] date you want these people served, rather, brought into Court?

THE DEFENDANT: Monday.

THE COURT: Monday.

All right, then, would your office draft the subpoenas?

Get the information from Mr. Banks on the names and the times he wants them, and you draft the subpoenas and the Clerk will sign them.

THE CLERK: Your Honor, those subpoenas are issued down in the bull pen, in the Clerk's office down in the bull pen.

THE COURT: Yes, and you take them over to the Sheriff and have him serve them.

THE DEFENDANT: In this particular case, I would like to know, your Honor, am I entitled to the opinion of an expert witness?

THE COURT: If there is anything that—and, again, I say we are just talking about what we have in the case so far, I don't know what is going to develop in the future in the case—but I can't see anything that has happened so far where any witness on the subject you have referred to is necessary.

THE DEFENDANT: Well, why not? They have identified me, for one thing. They claim I looks like the fellow.

THE COURT: They have just related what they saw.

THE DEFENDANT: Yes.

THE COURT: And it is now the function of the jury, or will be when the case is submitted to them, if the case progresses in its usual fashion, for the jury to determine [fol. 460] whether or not, one, are they telling the truth and, two, are they correct in their identification.

It is not a question of telling the truth or lying, but are they just in error?

THE DEFENDANT: Well, wouldn't an opinion from an expert help clarify to the jury why the people can make an error in identifying a person?

THE COURT: Well, this certainly is within the province of laymen.

We are down to the question of they have just taken a look, the witnesses have all testified they looked at the robber in each case who came into the store, and they are just telling what they saw.

Now, we don't need an expert to interpret that.

THE DEFENDANT: Yes, I believe you do. I disagree, your Honor. Of course, you can overrule me, but I still disagree.

But I do believe that an expert opinion along this line does help, because he can explain some things about the man that I am unable to explain myself.

That is why I want him in there, because he know more about the human mind than I do.

THE COURT: No, there is no need for an expert on what we have heard so far on this point at all.

Now, is there anything else?

Just so the record is complete, your motion for the expert is denied. This is on the basis of the County em-
[fol. 461] ploying an expert. That is what you are asking.

Of course, you can issue your supoenas. The Court does not do that for you, anyway. These are all local people, including Dr. Kirk, so there is no reason why the Judge—

THE DEFENDANT: If you issue a supoena, he will come.

THE COURT: He won't come unless he is paid.

THE DEFENDANT: I would like for you to issue a subpoena for him.

THE COURT: On what you have told me, there is just no basis, and the Court does not issue local subpoenas.

If you want him as a witness as to something he has seen or heard or knows about the case, subpoena him. But if you want him as an expert, you, of course, have to be prepared to pay for him, or if you are unable to pay the County has to pay.

But in this case, there is just no need for the County spending money to employ an expert in the field you are mentioning.

THE DEFENDANT: In other words, then, I can't call this witness no way under no circumstances; is that it?

THE COURT: Not unless it is your contention he knows something about this case and the facts of the case, that he was there, he either saw you on the night of May 4th or he was in some of the establishments or in some way can testify just as the others have as to what he saw or heard that is material to this case.

Now, you are not calling him on that basis, you are not [fol. 462] calling him to get on the stand and you are going to ask him a question, "What did you see on the night of May 4th"?

THE DEFENDANT: No. I thought I was entitled to an expert witness to testify to things which control the acts of different people's recognitions.

THE COURT: No. I can see no need for an expert on matters you have related.

All right, is there anything else?

THE DEFENDANT: Oh, yes. And I would like to get this book on California Jury Instructions.

THE COURT: All right.

THE DEFENDANT: And I would also like to know from this Honorable Court, whether the witnesses I called to appear in this case, will they be paid by the County?

THE COURT: Yes.

THE DEFENDANT: O.K. Thank you.

THE COURT: They will get the witness fees.

THE DEFENDANT: O.K.

(Defendant hands papers to the Clerk.)

THE COURT: What's that?

THE DEFENDANT: That is my motion. I would like for all my motions to be in writing.

(Whereupon, at 10:35 o'clock a.m., the proceedings in chambers outside the presence of the jury were concluded.)

[fol. 463]

PROCEEDINGS IN OPEN COURT
10:35 A.M.

THE COURT: Stipulated the jury is all present.

We will resume with Mr. Pauletich.

The Court reminds you you are still under oath, Mr. Pauletich.

All right. Mr. Banks.

WILLIAM PAULETICH,

previously called as a witness on behalf of the People, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS-EXAMINATION—(Resumed)

Q. (By the Defendant) Mr. Pauletich, did you see the robber when he left your store on the night of May the 4th? A. Yes.

What was that, again? I didn't get it. Did I see the robber leave?

Q. Yes.

THE COURT: Well, now, when he left the store. We have a little bit of testimony on this, that he was running down the street, that he was brought back by the police later on. So will you state again just when you are referring to?

[fol. 464/465] THE DEFENDANT: Yes, sir. On the night of May 4th, the robbery, that is what I am referring to.

THE COURT: Well, there is a little difference in definition between your use of the term and the witness', so if you will clarify it so he understands exactly what you mean.

Now, at approximately what time? While the robber was running down the street?

THE DEFENDANT: No. I asked him did he see the robber leave his store on the night of May 4th.

THE COURT: All right.

THE WITNESS: Yes.

Q. (By the Defendant) Did you know whether he walked out or run out of your store? A. Well, he didn't run; he walked.

Q. He didn't run; he walked. Are you sure of that? A. Well, not run. I don't think he run, no.

Q. Did you see the robber leave your store? A. Yes.

Q. Do you ever recall making the statement that you did not see the robber leave your store? A. I don't remember.

Q. I would like to refresh your memory. I would like for you to read Page 48 of the Municipal Court transcript before Honorable Judge Fisher, presiding, Department No. 5. I would like for you to read Lines 5 to 7.

(Witness reads same.)

Q. (Reading):

[fol. 466] "Question: Do you recall now, did you see the robber leave your store?

"Answer: Yes, I seen him. Sure, I see him leave the store."

Do you recall making that statement you didn't see the robber leave your store, which you have just read?

MR. MURPHY: Well, I object to that as testimony by the Defendant.

THE WITNESS: He must have left the store.

THE COURT: Yes. Now, if you wish to impeach him, read the statement.

Q. (By the Defendant) On Page 48, Line 5, the question that was asked of you by examining counsel:

"Question: What happened then?

"Answer: She give him the money. He started to walk out and another customer walked in, and I didn't notice whether he ran or walked out."

Did you make that statement? A. That's right. I didn't notice whether he ran or walked. You went out, though, I know that. You went out.

Q. Did you make that statement, that you didn't— A. I may have, I don't remember. I may have said it, yes. I know you left. You left the store.

Q. You must remember you was under oath when you made that statement.

MR. MURPHY: Object to that as argumentative.

[fol. 467] THE COURT: That is argumentative and unnecessary.

Q. (By the Defendant) Mr. Pauletich, when the police brought the Defendant—

MR. MURPHY: Just one moment.

There is a witness here. I just noticed him in the Courtroom.

THE COURT: All right. Go ahead, Mr. Banks.

Q. (By the Defendant) When the police brought the Defendant into your store on the morning of May 5th, was you advised by the police that this Defendant had been arrested in another store in the act of committing a robbery? A. I don't remember; I don't remember.

Q. You don't remember? A. No.

Q. Do you recall whether or not you had just finished talking to a police officer when the Defendant was brought into your store on the morning of May 5th? A. Well, there was an officer in there after this occurred. I don't know how long he stayed. He was doing his duty, to take a report.

Q. Did you see anyone else in your store at the time that the police brought the robber in dressed in a sport coat similar to the one the robber had? A. I believe there was someone in there. There was a little excitement going on, and I think there was some people in the store.

Q. But did you see anyone else with the police at that [fol. 468] particular time who had on a sport coat?

THE COURT: Now, anyone else than who?

THE WITNESS: I don't understand the question.

THE DEFENDANT: What did you say?

THE COURT: "Did you see anyone else with the police?"

THE DEFENDANT: Yes, that had on a sport coat at that time.

THE COURT: Now, who is the person you are excluding from this at this time?

THE DEFENDANT: Other than the Defendant.

THE WITNESS: I don't remember.

Q. (By the Defendant) Have you had occasion to read the transcript of the testimony you made before on the stand? A. No.

Q. Before this trial? A. No.

THE DEFENDANT: No further questions, your Honor.

MR. MURPHY: That is all of this witness.

THE COURT: The witness is excused.

Thank you, Mr. Pauletich.

(Witness excused.)

MR. MURPHY: People will call Mr. Slaise.

SAM SLAISE,

called as a witness on behalf of the People, being first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: State your name for the record, please.

[fol. 469] THE WITNESS: Sam Slaise.

THE CLERK: Will you spell your last name?

THE WITNESS: S-l-a-i-s-e.

THE CLERK: Thank you.

Will you take the stand, please.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Slaise, is that the way you pronounce your name? A. That's right.

Q. Calling your attention to the 4th of May of this year, about 11:30 in the evening, did you have occasion to be at the Linden Liquor Store at 1051 - 16th Street in the City of Oakland? A. How is that, now? I didn't understand.

THE COURT: What did you say?

THE WITNESS: I want to get it right, so I can answer it. I can't hear out of one ear. That's the reason I asked him to say it again.

THE COURT: All right.

Q. (By Mr. Murphy) Were you at the Linden Liquor Store at 16th and Linden Strets, City of Oakland? A.

I wasn't there. I was coming down the sidewalk on 16th Street toward Chestnut.

Q. Were you near it, or outside of the Linden Liquor Store, at about 11:30? A. I wasn't there. It was like this is the glass here (indicating), and this is a beauty [fol. 470] parlor right there (indicating), and by the time the man come out of the liquor store, I was getting near the liquor store there, and Bill told me to catch him.

Q. Let's go back a step.

You were in the are of the Linden Liquor Store? A. I was on my way by there. I had just got to the corner.

Q. You hadn't quite got to the corner at the time? A. Hadn't got quite to the corner, so I could see in there.

Q. What happened when you got to the Linden Liquor Store on the corner where it is located? A. By the time I got there a man ran out and Bill told me to catch him.

THE DEFENDANT: Objection as hearsay.

THE COURT: Yes.

Q. (By Mr. Murphy) When the man run out of the liquor store, did he talk to you? A. He didn't say anything to me.

Q. What did you do after this man ran out of the liquor store? A. After Bill told me to catch him—

THE DEFENDANT: Objection, your Honor.

THE COURT: Well,—

Q. (By Mr. Murphy) Who is "Bill"? A. I think he is the owner of the store. That is all I know about him.

THE COURT: Just leave out the conversation. Leave out what anybody said and just tell us what happened, [fol. 471] without repeating any conversations.

Q. (By Mr. Murphy) You said Bill said something to you?

THE COURT: The jury is admonished to disregard the statements in the conversation.

Q. (By Mr. Murphy) Without telling us what Bill said, he spoke to you; is that right? A. He told me—

Q. Now, don't tell me what he said. He spoke to you; is that right? A. No, he didn't speak to me. I was just coming up, I was just coming along the street.

Q. All right. After this man, Bill, came out, did you go anywhere? A. I turned around and I followed the man back to Chestnut and looked where he went.

THE COURT: Which man did you follow, the man who came out of the store?

THE WITNESS: The man who came out of the store with the money in his hand.

Q. (By Mr. Murphy) When you saw this man come out of the store, did you see whether or not the man was carrying anything? A. He had this hand in his pocket (indicating), and he had money in this hand (indicating).

THE DEFENDANT: I object, your Honor. It is immaterial to the evidence, because he hasn't stated what man who he saw or what man he was following.

MR. MURPHY: Well, I will reframe the question.

[fol. 472] THE COURT: All right.

Q. (By Mr. Murphy) Mr. Slaise, did you see a man come out of the liquor store when you were approaching? A. I saw him come out of the liquor store.

Q. All right. Now, did you see in what direction this man went? A. He come out—

THE DEFENDANT: I object, your Honor, on the ground of what man, what man is he talking about?

THE COURT: The man who came out of the liquor store.

THE DEFENDANT: But he should have some specific name of the man who came out of the liquor store.

THE COURT: Well, if it is not connected up, it can be stricken.

THE DEFENDANT: It is not connected up in any way.

THE COURT: But he doesn't have to prove his whole case in one question.

Q. (By Mr. Murphy) Now, this man that you saw come out of the liquor store, did you see in what direction the man went? A. I saw which way he went.

Q. Which way did he go? A. He come out of the liquor store, went down the street, walking fast, and before he got to the corner of Chestnut, 16th and Chestnut, he went across the street on a 45-degree angle, kind of trotting, and he turned and went down Chestnut.

Q. All right. Now, this man that you saw come out of the store and go down 16th toward Chestnut, did you

[fol. 473] see whether or not this man was carrying anything in his hand? A. Yes, he had money in his hand, and he had his other hand down in his pocket. He had a coat on and he had his hand in his pocket.

THE COURT: You say he had money in his hand and his hand in his pocket.

THE WITNESS: His right hand in his pocket.

THE COURT: What hand did he have the money in?

THE WITNESS: His left hand.

Q. (By Mr. Murphy) And you say his right hand was in the— A. Coat pocket.

Q. —pocket.

Now, this man—

Well, maybe we can do it this way: Will you take a look at the diagram over here on the board?

Now, will you examine the diagram first and see if you can see where the liquor store is at. A. Right here (indicating). The liquor store sits right on this corner here (indicating).

Q. You are indicating a point marked as "S-3" on the diagram; is that right? A. Yes.

Q. Linden and 16th A. 16th.

Q. All right. Now, when the man came out of the store, which way did he go? Will you show us on that map?

THE COURT: Mark it with a pencil, so we can see it. Or use the pen there. You don't have to write any-[fol. 474] thing, but just trace it with the pen.

(Witness does same.)

THE COURT: Now, Mr. Slaise, will you stand back so the jury can see where you are pointing. Back a little further.

All right.

THE WITNESS: This is the liquor store right here (indicating). O.K. I come up this way (indicating). Excuse me if I get a little nervous.

Could I tell it the way I saw it?

THE COURT: Yes, you can tell it.

Q. (By Mr. Murphy) You can tell it. Do you want me to mark it as you tell it? A. Yes.

Q. All right. Stand a little ways away from there. A. All right.

Q. When the man came out of the liquor store, what direction did he go? A. He came back towards Chestnut.

Q. If I draw a line from the corner down toward Chestnut, would that be correct? A. That's right.

Q. Now, when he got down toward the corner of Chestnut and 16th, what direction did he go then? A. Turned right and went down 18th, or Chestnut.

Q. Did he stay on the same side of the street or did he cross the street? A. He cut over before he got to the corner.

Q. What do you mean, "He cut over"? A. He crossed [fol. 475] the street.

Q. Now, when he got across 16th Street, in what direction did he go then? A. He went on down Chestnut to the right-hand side on 18th.

Q. Toward 18th Street? That would be the next street north? A. That's right, the next street over.

Q. All right. Is that line about right (indicating)? A. That's right. But he would be on the sidewalk.

Q. Yes, of course. The diagram isn't quite big enough to show that.

But, anyway, how far down Chestnut toward 18th Street did the man go? A. Until about the middleways of the block.

Q. When he got toward the middle of the block, what did you see happen then, if anything? A. He disappeared in a car. He was driving a car, and the car had taken off.

Q. What direction did the car go? A. He went down Chestnut to 18th.

Q. I will put a little "X" on it, about the middle of the block. A. About the middle of the block.

Q. That would be where the car, you said, was? A. Yes.

MR. MURPHY: I will mark that "SS-1," your Honor, for Sam Slaise.

THE COURT: All right. "SS-1."

[fol. 476] Q. (By Mr. Murphy) Now, after the car started, which way did the car go? A. It went down and hit 18th Street, and turned to the right.

Q. If I draw a line in that direction, would that be correct? A. That would be right.

Q. Did you see the car after that? A. I didn't see it any more.

Q. Did you see what the car looked like? A. It was dark, I couldn't see it.

Q. After the man got up to where the car was and the car pulled out, did you see the man any more? A. I didn't see him any more.

Q. Now, as to this man that you saw go out, was he walking or running up the street to where the car was? A. He was—You wouldn't call it running, but trotting like, you know, kind of a little fast trot. He wasn't actually running.

Q. At this time would you be able to recognize this man if you saw him again? A. No, I wouldn't, because it was dark that night.

MR. MURPHY: I believe that is all of this witness.

THE COURT: All right, Mr. Banks.

CROSS-EXAMINATION

Q. (By the Defendant) You wouldn't be able to recognize that man? A. No, not at night, because I wasn't [fol. 477] expecting nothing to happen. I was walking along with my head down.

THE DEFENDANT: Your Honor, I object to the testimony of this witness because he and the State's Attorney haven't proven anything.

I ask to have the jury disregard his statements.

THE COURT: Well, whether he has proven anything or not is up for the jury to determine.

THE DEFENDANT: O.K.

Q. How do you pronounce your name? A. Slaise.

Q. Slaise? A. Slaise, yes.

Q. Did you notice any of the clothes this man wore, Mr. Slaise? A. It was that dark, I couldn't tell. It was 11:30 at night.

THE DEFENDANT: No questions, your Honor.

THE COURT: All right.

MR. MURPHY: That is all, Mr. Slaise.

THE COURT: Thank you. You are excused.
THE WITNESS: O.K. Thank you.
Can I go back to work?
THE COURT: Yes, you are excused.
THE WITNESS: O.K., thank you.

(Witness excused.)

MR. MURPHY: Mr. Smith.

COATSIE SMITH, JR.,

called as a witness on behalf of the People, being first [fol. 478] duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE CLERK: State your name for the record, please.
THE WITNESS: Coatsie Smith.
THE CLERK: Will you spell your name, please?
THE WITNESS: C-o-a-t-s-i-e.
THE CLERK: And the last name is Smith, right?
THE WITNESS: Junior.
THE CLERK: Junior?
THE WITNESS: Yes.
THE CLERK: Thank you.
Would you take the stand, please.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Smith, where are you employed? A. Naval Supply.

Q. Now, calling your attention to the 4th of May of this year, shortly before midnight on that evening, did you have occasion to be at the place called Sobek's Liquors? A. Yes.

Q. Were you employed there at that time? A. Yes.

Q. About that time in the evening on the 4th of May, did anything unusual happen? A. I beg your pardon?

Q. About that time, shortly before midnight, on the evening of the 4th of May at Sobek's Liquors, did anything unusual happen? A. Yes.

[fol. 479] Q. All right. First of all, where is Sobek's Liquors located? A. 21st and Market Streets, in Oakland.

Q. That is in the City of Oakland? A. Yes.

Q. What was it that happened there that was unusual? A. Well, the fellow come in and he asked if I owned the store or did I work there. I told him that I just worked there. Then he asked did I have a gun.

THE DEFENDANT: Objection, your Honor, on the ground this witness hasn't testified to nothing that is material in this particular case.

THE COURT: Well, I think we should identify the person that came in.

MR. MURPHY: All right.

THE DEFENDANT: The State's Attorney hasn't even made any connection in the case whatsoever, just started off with the questions.

THE COURT: Yes.

Q. (By Mr. Murphy) Do you see the person that came in the liquor store at that time in the Courtroom? A. Yes.

Q. Will you point to that person, please? A. This man here (indicating).

THE COURT: All right. Indicating the Defendant.

Q. (By Mr. Murphy) Then you had some conversation with this man when he came into the liquor store; is that correct? A. Yes, I did.

[fol. 480] THE DEFENDANT: Objection, your Honor, on the ground that the evidence given is immaterial to the case.

THE COURT: I didn't hear you.

THE DEFENDANT: Objection on the ground that the evidence he is asking him is immaterial to the case.

THE COURT: Mr. Murphy and Mr. Banks, will you approach the bench.

(Discussion off the record.)

MR. MURPHY: Read the question back.

(Question read.)

Q. (By Mr. Murphy) All right. What was the conversation that took place when this man came into the

liquor store? A. Well, he asked if I owned the place or did I work there, and I told him that I just worked there, and then he asked me if I had a gun. And then I told him why did he ask me that, and he told me, "Well, I might want to hold you up."

Q. What happened after that? A. Well, the police walked in, and then he proceeded to ask me for a half a pint of Old Taylor, and I told the officers I didn't like just what he had said.

Q. Now, wait a minute. When you spoke to the officers, where was this man that had come in? A. He was standing directly in front of me.

Q. How far away, in feet? A. Right behind the counter, on the other side of the counter. I don't know, a couple of feet, I guess.

[fol. 481] Q. And when you spoke to the officers, he was right across the counter from you; is that what you mean? A. Yes, he was standing right there.

Q. Were you speaking in a normal voice at that time? A. Yes.

Q. And what did you say to the officers? A. Well, I told them that I didn't like what this guy said, and he asked me, "What did he say," and I told him.

Q. And did Mr. Banks, or the man who was in there, say anything at that time? A. No, he didn't say anything that I can remember.

Q. Was there any conversation about a gun that you heard at that time? A. Well, I told the officers what he had said, and he told me that some places had been held up, and he told Mr. Banks, "Buddy, you fit the description," and he began to search him.

Q. Was there any conversation about—

Withdraw that.

Did the man who came in say anything about a gun at that time? A. Not that I can recall.

Q. That is, after you had talked to the—made that statement to the police. A. Not that I can remember.

MR. MURPHY: All right, that is all.

THE COURT: All right, Mr. Banks.

[fol. 482] CROSS-EXAMINATION

Q. (By the defendant) Mr. Smith, I would like to call your attention to the morning of May 5th.

MR. MURPHY: Oh, may I ask another question? I meant to ask one more question of this witness, your Honor.

May I interrupt?

THE COURT: Yes.

MR. MURPHY: Excuse me.

THE COURT: Go ahead, Mr. Murphy.

DIRECT EXAMINATION (Reopened)

Q. (By Mr. Murphy) When this man came into the liquor store, did you notice where his hands were on his person? A. No, I didn't.

Q. Well, more specifically, did you notice whether or not he had either of his hands in his pocket? A. No. I can't remember.

MR. MURPHY: All right, I have no further questions.

CROSS-EXAMINATION (Resumed)

Q. (By the defendant) Mr. Smith, calling your attention to May the 4th, May the 5th, on the morning of May 5th, when I happened to be present in your liquor store, did we have a conversation before the police arrived? A. The morning of May 5th?

Q. Yes. A. No, we didn't.

[fol. 483] Q. At the time did you not—do you recall—rather, to refresh your memory, did you have occasion to tell me the story about a lady getting killed in your liquor store that used to be employed there? A. No, I didn't, not that I can remember.

Q. Did a lady—Do you ever recall making a statement about a lady getting killed there? A. Oh, yes, I mentioned it to several people.

Q. But you don't recall telling me that story as I was standing up there at the bar, at your counter, that particular morning, do you, when the police came in? A. The morning of May 5th?

Q. That's right. A. I would have to know what time of the morning that was.

Q. That was after 12:00 o'clock when I was in your liquor store. A. No.

Q. I would like to refresh your memory.

How long was I in your liquor store before the police arrived? A. Oh, about five minutes, I guess, three to five minutes.

Q. Had I attempted to rob you? A. No, you hadn't.

Q. But we were discussing a quiet night; is that right? A. I beg your pardon?

Q. We were discussing a quiet night; isn't that right?

A. I don't remember. I have anywhere from 150 to 200 people a night. The first thing that come to my mind, [fol. 484] I might discuss it.

Q. When I came into your liquor store did I not ask you for a half a pint of Old Taylor whiskey? A. After the police got there, yes, you did.

Q. Was it after the police had got there or before the police got there? A. After.

Q. And you was telling me the story about the lady getting killed, and I was standing listening to you? A. No, that wasn't the way it was at all.

Q. Had you ever seen me in there—Had you ever seen me before that night? A. Not that I can remember, no.

Q. But you do recall a lady getting killed in that liquor store that used to work there; is that right? A. That's right.

Q. And you do recall telling people about that, customers that come in that store, about the lady being killed there; is that right? A. I do what?

Q. You do recall telling customers when they come in this store there about this particular lady getting killed there; isn't that right? A. No, I don't make it a habit of discussing that with everybody that comes in the store. If somebody should happen to mention it, I will confirm it, yes.

Q. But you don't recall telling the defendant in this—you don't recall telling me that night? A. No, I don't [fol. 485] recall telling you. I am not going to deny that I did, because it is possible that I did. If you asked about it, I probably did.

Q. And I was in your store carrying on this conversation with you when the police came in? A. No, you wasn't.

Q. Do you recall that? A. No, you weren't.

Q. Well, what were we talking about when the police came in? A. You were talking about asking me did I have a gun and that you might want to hold me up, and I said, "Why do you ask that?"

Q. Are you sure of the words that I used? A. I am positive. Word for word I can tell you.

Q. Isn't it true when I came into your store, if you would think hard and clear enough, I said, "It is awfully quiet tonight." A. Well, it is never a quiet night on a double pay day on the first of the month.

Q. Was there anyone in this liquor store other than you and I? A. I don't remember. There might have been one person in there, one or two people, I don't remember.

Q. You don't remember? A. No, I don't.

Q. Did you have occasion, Mr. Smith, to discuss this incident with the police inspector? A. When was this?

Q. Since it occurred. A. No.

Q. You haven't discussed it with anyone? A. No.

[fol. 486] Q. Did you have occasion to go to the city hall on May the 5th or 7th? A. No.

Q. Concerning this matter? A. No.

Q. Mr. Smith, when I asked you for a half pint of Old Taylor, did you not take this whiskey and wrap it up and lay it on the counter? A. I usually do when people ask for a bottle, but I don't know whether I did in your case or not. I can't remember.

Q. And what did the petitioner—What did I say when the police told me, asked me to come go with them? A. I can't remember you saying anything. But when they asked you where did you get the money in your pocket, you said you worked or were working. That is the only thing I can remember you saying at all to the police.

Q. Think hard. In refreshing our memory, do you recall hearing me say, "Let me pay the man for this whiskey"? A. No, I don't remember you saying that at all.

Q. But you do recall the statement when they asked me about the money, I told them, "I worked for it"; is that right? A. That's right. That is what you said.

Q. You recall that statement? A. Yes.

Q. Mr. Smith, when I was talking to you that night, do you recall me leaning against the counter like this when I was talking to you, with my back turned to you? A. No, I don't.

Q. Mr. Smith, did you see a gun on me that night? [fol. 487] A. No, I didn't.

Q. Mr. Smith, on that night do you recall walking to the front of the store behind the counter and back when I was talking to you? A. Walking where?

Q. Walking to the front of your store and back behind the counter, walking up to the front of it and then walking back while I was standing there talking to you. A. No, I don't. I don't recall.

THE DEFENDANT: No further questions, your Honor.

MR. MURPHY: I just have a couple of questions.

THE COURT: All right.

REDIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Smith, you have testified about the defendant being asked where he got the money in his pocket. A. Yes.

Q. Now, did you see some money in the defendant's pockets at that time? A. Well, the police took it out.

Q. Did you see it? A. I don't remember, but it was in two or three different pockets.

Q. Did you see them take the money out of two or three different pockets? A. Yes, I did.

Q. Did you have occasion to see what denominations of money were taken from his pockets? A. No, I don't [fol. 488] remember what it was.

Q. Do you know of your own knowledge how much money was taken from his pockets? A. No, I don't.

MR. MURPHY: All right, that is all I have of this witness.

THE COURT: All right.

Mr. Smith, you made the statement the officer stated, "There has been some robberies, and you fit the description."

THE WITNESS: That is what he told this—

THE COURT: That is what he told who?

THE WITNESS: He told this young man here.

THE COURT: Now, you are referring to the defendant?

THE WITNESS: Yes, I am.

THE COURT: All right.

THE WITNESS: I guess he was coming to warn me in some sort—

THE COURT: Well, that can be stricken if you are guessing.

When he told the defendant that "Some robberies had been committed and you fit the description," what did the defendant say, if anything?

THE WITNESS: Nothing, he didn't say anything.

THE COURT: What did he do?

THE WITNESS: Well, he wanted to search him, and he just raised his—

THE COURT: No, what did the defendant do?

THE WITNESS: He did nothing.

THE COURT: Nothing, all right.

Now, Mr. Banks, do you have another question?

[fol. 489] THE DEFENDANT: Yes, your Honor.

RECROSS-EXAMINATION

Q. (By the defendant) Are you sure that you didn't hear the defendant protest? You heard him protest about he earned his money. A. What?

Q. He earned his money, he worked for his money. Didn't you hear him say that? A. I heard him say that, yes.

Q. But you didn't hear any other protest; is that right? A. That's right.

Q. And you were supposed to have been listening; isn't that right? A. I was listening.

Q. And you didn't hear the defendant ask the officer what robbery he was referring to or talking about or

where or whom did he rob? A. No, I don't remember you saying anything. As a matter of fact, it stood out in my mind you didn't say anything.

Q. What did you say? A. I said, as a matter of fact, what stood out in my mind most was you didn't say anything.

Q. Oh, I didn't say anything? A. That's right.

Q. That is what you recall? A. Definitely.

Q. How long, Mr. Smith, was the defendant in your store before the police officers came in? A. I don't know, I guess about five minutes. I don't remember. It wasn't [fol. 490] very long, just long enough to say what you said.

Q. From what you say, I was in there about five minutes before the police arrived. A. Somewhere in that neighborhood, yes.

Q. Since you was employed there, and refreshing your memory, did a lady get killed there since you have been working there? A. She got killed one day before I started working there, one night.

Q. I want to refresh your memory. You don't remember telling me about it? A. On May 5th? If that was on a Monday morning. I work days at Naval Supply and nights there. I don't come to work there until 6:00 in the evening.

Q. I think this is the night of May 4th and 5th.

THE COURT: I think you are referring to May 4th and 5th, approximately midnight, so whether it was May 4th or May 5th, it was just before or after midnight.

A. Yes, it was right before, 10 minutes to 12:00, around that time.

Q. (By the defendant) So you don't remember telling me that story? A. I guess I did. I didn't deny telling you. I said if anyone come in and asked about it, I will confirm it. I don't discuss it often, but I will talk about it. It is not a very pleasant thing to talk about, anyway, not with me being behind the counter.

[fol. 491] THE DEFENDANT: No further questions, your Honor.

MR. MURPHY: That is all of this witness.

THE COURT: Thank you. You are excused.

(Witness excused.)

We will take a short morning recess at this time.

I will again admonish the jury not to discuss the case or form any opinion at this time.

(Morning recess taken.)

THE COURT: All right, the jury is all present.

Now, ladies and gentlemen of the jury, I understand the prosecution has one witness that will only take a few moments, and he is not available.

And your witnesses are not available this afternoon, are they, Mr. Banks?

THE DEFENDANT: No, your Honor.

THE COURT: Well, we might just as well recess until Monday morning.

Your witness isn't available now, he is coming this afternoon.

MR. MURPHY: That's right.

THE COURT: Well, there is no use having to bring back the jury for just a few minutes this afternoon.

So at this time I will again admonish you not to discuss the case among yourselves or with anyone else or form or express any opinion at this time.

[fol. 492] We will recess until 10:00 a.m. Monday.

Have a good week end.

(Whereupon, at 11:50 o'clock a.m., a recess was taken until 10:00 o'clock a.m., Monday, August 6, 1962.)

PROCEEDINGS OUTSIDE THE PRESENCE OF THE JURY—11:50 A.M.

THE COURT: We are in the courtroom now, the jury however has retired.

Mr. Banks is present, Mr. Shaughnessy, Mr. Murphy, Bailiff, Clerk, reporter.

All right, Mr. Banks.

THE DEFENDANT: All right, your Honor. I would still like to have that witness. I can't get it out of my mind.

THE COURT: You are referring to Professor Kirk?
THE DEFENDANT: Yes.
THE COURT: The Court cannot see that the witness is necessary. In fact, it is very questionable whether he could give any testimony on the field in which you have related. In fact, that is not his field.
THE DEFENDANT: Well, then, could it be arranged through the Court where I could talk with him?
THE COURT: I can't order him to appear so you can talk to him any more than I can order a doctor to come down and treat you for a cold or anything else.
[fol. 493] I would advise you he is a private individual and he doesn't have to give up his time.
THE DEFENDANT: Okay, thank you, your Honor.
THE COURT: All right, fine.
Then we will stand in recess until 10:00 a.m. Monday, and you will have your witnesses here Monday ready to go.
THE DEFENDANT: Yes.
THE COURT: All right, fine.

(Whereupon, at 11:54 o'clock a.m., proceedings in the above-entitled matter were recessed until Monday, August 6, 1962, at 10:00 o'clock a.m.)

[fol. 494]

MONDAY, AUGUST 6, 1962 11:30 O'CLOCK A.M.

PROCEEDINGS IN CHAMBERS OUTSIDE THE PRESENCE OF JURY—11:30 A.M.

THE COURT: All right, we are in chambers. The defendant is present, Mr. Shaughnessy, Mr. Murphy, Clerk, reporter, Bailiff.
All right, Mr. Banks.
THE DEFENDANT: Yes, your Honor, I would like to—I wanted to make a motion to call two more additional witnesses.
THE COURT: You don't need any motion on that. All you have got to do is just go ahead and call them.

THE DEFENDANT: I wanted to call Mr. Nielsen, but I understand he is to be present.

MR. MURPHY: He is our next witness in order.

THE DEFENDANT: He didn't give me a list of the witnesses, you know. I mean, I didn't know who I was supposed to call.

Is that the only witness you have now that I intend to call? I was intending to call some more.

MR. MURPHY: I may call Inspector Zweigle again; however, that depends on what develops in the defendant's case.

THE COURT: That would be rebuttal, yes. You won't know until after the defendant puts on his case.

Mr. Banks; if you want any witnesses, all you have to do is just go ahead and call them.

THE DEFENDANT: Well, if he is the next witness, [fol. 495] I won't have to call him.

THE COURT: Yes.

THE DEFENDANT: Also, I wanted to see about making a motion to strike the last two prosecution witnesses' testimony from the record because they haven't even connected it up in any way, your Honor.

He haven't showed no way of connecting it anywhere with these two last witnesses.

THE COURT: I will just get my notes here and take a look at the names. The last two witnensses, I guess, were Coatsie Smith—Isn't it? I'm not too sure of the pronunciation on that.

THE CLERK: Your Honor, may I say a word?

THE COURT: Yes.

THE CLERK: I believe it is Sam Slaise and Coatsie Smith.

THE COURT: Yes, and Sam Slaise was the one before. No, they are definitely connected.

THE DEFENDANT: What did you say?

THE COURT: They would be connected on one thing, if nothing else, the adoptive admission.

THE DEFENDANT: What did you say?

THE COURT: They would be connected on the admission of the police officer testifying. The officer stated, "There had been some robberies, and you fit the descrip-

tion," those are the words as I have them down, to which there was no answer or denial.

[fol. 496] That, in itself, is sufficient to make the testimony—

THE DEFENDANT: Yes, but that last witness, he haven't connected me, he haven't connected me with the case in any way.

THE COURT: Yes. Well, the motion will be denied. All right, bring down the jury.

(Whereupon, at 11:37 o'clock a.m. the proceedings had in chambers were concluded.)

PROCEEDINGS IN OPEN COURT
11:37 A.M.

THE COURT: Stipulated the jury is all present. All right, Mr. Murphy.

MR. MURPHY: All right, Mr. Nielsen, or Officer Nielsen.

HARRY D. NIELSEN,

called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, please.
THE WITNESS: Harry D. Nielsen.
THE CLERK: And how do you spell your last name?
THE WITNESS: N-i-e-l-s-e-n.
THE CLERK: Thank you. Take the stand, please.

DIRECT EXAMINATION

Q. (By Mr. Murphy) Mr. Nielsen, you are a mem-
[fol. 497] ber of the Oakland Police Department; is that correct? A. That is correct.

Q. Officer Nielsen, calling your attention to the 4th of May of this year, 1962, at about 11:50 in the evening, did you have occasion to be at a place called Sobek's Liquors on Market Street in Oakland? A. That is correct.

Q. At that time did you have occasion to go into Sobek's Liquors? A. I did.

Q. And will you describe for the jury what happened when you entered the liquor store? A. Yes. When I entered the liquor store, there were two people inside. There was a man standing at the counter and the clerk behind the counter.

Q. Now, do you see the man who was standing at the counter in the courtroom here today? A. Yes, I do.

Q. Will you indicate who he is for the record? A. The gentleman with the yellow shirt on (indicating).

THE COURT: The witness has indicated the defendant.

Q. (By Mr. Murphy) Now, did you—Without stating what it was, did you have a conversation with the person behind the counter? A. I did.

Q. Do you know what that person's name was? A. I remember his first name, I don't know what his last name is.

Q. What was his first name? A. His first name was Coatsie.

[fol. 498] Q. Now, at that time did you make an arrest of somebody? A. I did.

Q. Who did you place under arrest? A. I arrested the defendant.

Q. Now, at the time that you placed him under arrest, did you make any search of his person? A. I did.

Q. Can you state what you found in the process of making this search? A. Yes. I found—Originally, I was looking for a gun, a weapon of some type, then I recovered money out of the man's pocket.

Q. You say, "pocket." Did you recover money out of one pocket or more than one pocket? A. Well, at the scene of the arrest, I recovered money out of the breast pocket of his shirt which was rumpled up and stuffed in his pocket. I retained that and put it in my pocket, and later on at headquarters, I took some more money out of his other pocket and his wallet.

Q. Do you recall whether at the time you were at the Sobek's Liquors you ascertained whether or not he had money in other pockets? A. There was money in other

pockets, sir, but, like I said before, my main search was for a weapon at that time.

Q. Now, later on—

Withdraw that.

Did you thereafter go some place with the defendant, [fol. 499] Mr. Banks? A. Yes, sir. Subsequently, we went to the Inspector's Division at the Oakland Police Department.

Q. Before going there, did you go anywhere else? A. Yes, we went to 16th and Linden.

Q. Did you go into some establishment at that place? A. Yes, sir.

Q. And what place was that? A. That was the liquor store at the corner of 16th and Linden.

Q. Is that the Linden Liquor Store? A. Linden Liquors, yes.

Q. Was it after that that you went to the police department? A. That is correct.

Q. Now, at the police department did you make any further search of Mr. Banks in regard to the money? A. I did, sir.

Q. And did you have occasion to determine the amount and denominations of money that he had on his person? A. Yes, sir, I did.

Q. All right, how much in total money did you recover from his person? A. $176.00.

Q. Do you recall what the denomination of that money was? A. No, sir; I don't.

Q. Did you make a report at the time or a list of the money or the denomination of the money taken? A. I did make a report, and I turned the money in to the [fol. 500] Property Clerk's office in the city hall.

Q. And if you saw that report again, would that refresh your recollection as to the exact denominations of money you found? A. Yes, sir, it would.

MR. MURPHY: I will show Mr. Banks an Oakland Police Department Property Record.

THE DEFENDANT: All right.

Q. (By Mr. Murphy) I will show you an Oakland Police Department Property Record. Do you recognize that document? A. Yes, sir. This is a copy of the re-

port I made at the Property Clerk's office. It has my name and serial number on it.

Q. Now, after examining that document, does that refresh your recollection as the exact denominations of the money that you found on Banks' person? A. Yes, sir.

Q. All right, what were the denominations of the money? A. There were seven $10.00 bills, totaling $70.00; 15 $5.00 bills, totaling $75.00; 31 $1.00 bills, totaling $31.00; and the grand total was $176.00.

MR. MURPHY: May this be marked for identification?

THE COURT: Yes, it will be marked People's next in order for identification.

THE CLERK: 27, your Honor.

THE COURT: As Exhibit No. 27.

(Oakland Police Department Property Record was marked People's Exhibit No. 27 for identification.)

[fol. 501] Q. (By Mr. Murphy) What pocket did you recover that money from? A. Well, both pants pockets, front pocket or breast pocket and a wallet.

Q. As to the three pockets you have mentioned, was the money loose or in any kind of a folder? A. With the exception of the wallet, the money in the wallet, the rest of the money was all loose and crumpled.

Q. Loose and what? A. Crumpled.

Q. Crumpled? A. Yes, sir.

Q. Now, at the time that you first went into Sobek's Liquors, had you received any resports on the radio about any robberies, without stating what you had heard? A. Yes, sir, I did.

Q. All right, after taking Banks down to the Oakland Police Department, was that the Inspector's Bureau? A. That's right.

Q. Did you have any further conversation with him down there? A. I did, sir.

Q. Was there anyone present at the conversation besides yourself and Mr. Banks? A. Yes, sir; there were several other officers there.

Q. I mean, were they immediately at the scene of the conversation or just in the area? A. As I recall, sir, I

can only think of one that was actually there that he might have heard the conversation. Like I said, there was [fol. 502] quite a few officers in the office, itself.

Q. Who was the officer that was in the immediate area? A. Officer Ticksman.

Q. Now, at the time of this conversation, did you reduce the conversation to writing in any fashion at all? A. No, sir.

Q. Did you make any threats of any kind in order to obtain a statement from Mr. Banks? A. No, sir.

Q. Did you make any promises to him of any kind in order to obtain a statement from him? A. None whatsoever.

Q. Did anybody in your presence either threaten him in any way or make any promises of any kind to him in order to obtain a statement? A. No, sir.

MR. MURPHY: Is there any voir dire on the voluntariness of the statement?

THE COURT: Do you have any questions as to—just as to the voluntariness of the statement?

THE DEFENDANT: What did you say, your Honor?

THE COURT: Do you have any questions you want to ask the witness just on the question of whether the statement was voluntary?

THE DEFENDANT: As I recall it, he said he didn't make any statement. That was my—

THE COURT: No, this is an oral statement. There is nothing written.

Officer Nielsen, you don't have the writing of this state- [fol. 503] ment?

THE WITNESS: No, sir; I do not.

THE DEFENDANT: Well, I object to the oral statement that he is going to testify to, your Honor, because—

THE COURT: Take your hand down from your mouth so I can hear you.

THE DEFENDANT: I object to the oral statement the witness might make because in this particular case he hasn't even proved that I—the defendant in this case has made any statement.

THE COURT: You mean, you asked for a copy of the statement and you didn't receive one?

THE DEFENDANT: No, I didn't see no copy of this statement that this officer here had taken.

THE COURT: Now, I understand this statement has never been reduced to writing.

THE DEFENDANT: Well, I object to it because I don't know what statement he is talking about. He hasn't even admitted to even saying what the statement is.

I have never seen the statement this officer is going to testify about.

THE COURT: Well, it is an oral statement. That is why you can't see it.

THE DEFENDANT: Yes.

THE COURT: They are a little hard to see.

THE DEFENDANT: But, quite naturally, if he went and told the State's Attorney of the statement they would [fol. 504] have reduced it to writing so I would know what type of statement it was.

MR. MURPHY: There is nothing reduced to writing in regard to this particular statement.

THE COURT: Now, then, have you any questions on the fact of whether it is free and voluntary?

THE DEFENDANT: Yes.

THE COURT: All right, you can ask him.

VOIR DIRE EXAMINATION

Q. (By the Defendant) Officer Nielsen, did the defendant inform you that he had a constitutional right about a statement, that anything he may have said to you couldn't be used against him? A. Did you inform me of that?

Q. Yes. A. Or did I inform you of that?

Q. No, you didn't inform me, I informed you. A. I don't recall you saying that.

THE DEFENDANT: Well, I will object then, your Honor, because, quite naturally, you know what I mean, the prosecution's witness would, quite naturally, not agree with me anyway.

THE COURT: Well, that is hardly an objection, the fact that he isn't going to agree with you, Mr. Banks.

Now, if you are saying he didn't inform you of the constitutional right, that is not required.

THE DEFENDANT: No, I informed him that I did make the statement.

THE COURT: That is the basis of your objection?

[fol. 505] THE DEFENDANT: That is right.

THE COURT: Well, that would not be actually an objection to it.

All right, Mr. Murphy.

DIRECT EXAMINATION (Resumed)

Q. (By Mr. Murphy) Did Mr. Banks make some kind of a statement to you in relation to the incidents of that night at that time? A. Yes, sir.

Q. All right, and was that statement made freely and voluntarily? A. It was in reply to a question that I propounded to the defendant.

Q. Well, in other words, was the answer that he gave free and voluntarily given, as far as you know? A. Free and voluntary; yes, sir.

Q. All right. What was the conversation you had with Banks at that time? A. My interest was in the possibility of a gun. I asked Mr. Banks, I said, "What did you do with the gun, Fred," and Mr. Banks answered that by saying, "I didn't have a gun." He said, "If I had one, I would probably have killed somebody tonight." He said, "Guns make me very nervous."

MR. MURPHY: All right, that is all I have of this witness.

THE COURT: All right, Mr. Banks.

[fol. 506] CROSS-EXAMINATION

Q. (By the defendant) Officer Nielsen, when you carried Banks to this Linden Liquor Store, did you leave him in an automobile and go in the liquor store? A. I did, yes.

Q. And did you have a conversation with Mister—one, Mr. Pauletich, the owner of the store? A. No, I didn't.

Q. But you did leave him in the car and go into the liquor store; is that right? A. That is correct.

Q. Then after conversing, who did you converse with when you went into the liquor store? A. I had a conversation with a sergeant who was at the scene, Sergeant Price.

Q. And who else did you converse with? A. And Officer Ticksman, that was all.

Q. And you didn't converse with the owner of the store? A. I did not.

Q. You did not. And after you conversed with them, what did you do then? A. I drove back to the Inspector's Division.

Q. You drove back? A. Yes.

Q. Let me ask you this: After you conversed with this party in the liquor store, did you not return to the car and take the defendant into the liquor store? A. I did not.

Q. And you are the arresting officer in this case; is [fol. 507] that right? A. I am one of the arresting officers; that is correct.

Q. And did you make a report on your actions of that night, I mean, in this particular incident? A. I did, I made the Arrest Report.

THE COURT: Is that the blue report form?

THE WITNESS: No, sir.

THE COURT: That would be a Field report?

THE WITNESS: The report that I made would be on the pick copy, sir. That is the other report, the Property Report.

Q. (By the defendant) So, since defendant was in your custody at that time, and you did not take him into this liquor store for this person, Mr. Pauletich, to see, who claimed to have been robbed, therefore—

THE COURT: Now, is this a question, Mr. Banks, or is this going to be a statement?

THE DEFENDANT: This is a question.

THE COURT: All right.

THE DEFENDANT: But in the form of kind of a statement in order to refresh his memory, your Honor.

Q. Therefore, then this defendant was not identified by the store owner, then; is that right? A. I didn't say that, sir. You asked me a question that if I took you in.

Q. I mean, that night. A. I replied I did not take you in there, that doesn't exclude the possibility that you did [fol. 508] go in there. If you asked me that question, I would tell you, sir.

Q. Well, you are the arresting officer, aren't you? A. That doesn't—

THE COURT: This is argumentative.

THE DEFENDANT: No, I am just asking him a question, your Honor.

Q. You are the arresting officer? A. I am the arresting officer.

Q. And the prisoner is in your custody; is that right? A. He is in my custody.

Q. And you are supposed to keep and confine that prisoner in your custody until he is released or until you turn him over to some other officer and place him in their custody; is that right?

MR. MURPHY: I object to that.

A. I couldn't have handcuffed you to my arm, that is not correct, either. You were in my custody even though at one point you were quite a few feet away from me.

Q. (By the defendant) During that night, did you turn me over to anybody at that particular liquor store? A. I did.

Q. And who did you turn me over to? A. As I recall, it was Sergeant Price.

Q. Yes, and did you leave then? A. Did I leave without you?

Q. After you turned me over to Sergeant Price, placed [fol. 509] me in his custody— A. I didn't place you in his custody. You were still in my custody. This is a fine point here. Actually, you were still in my custody even though Sergeant Price was closest to you, closer than I, as a matter of fact. But you were still in my custody. After you were identified, you were placed back in my police car and you were transported by me to the Inspector's Division.

Q. When you arrested me, what other officer were with you? A. When I arrested you, I was by myself at that time.

Q. You weren't with an officer by the name of Hartman? A. I was with an officer by the name of Hartman who was in the police car, but when you were placed under arrest, I was by myself.

Q. I see from this—You filled out an Arrest Report on the particular individual, did you not, Mr. Neilsen? A. That is correct.

Q. And did you put in this Arrest Report the officer that was with you as an arresting officer? A. That is correct.

Q. You feel, also, that he was also an arresting officer; is that right? A. That is the policy of the department.

Q. What? A. That is the departmental policy.

Q. Yes, but he was still listed as an arresting officer? A. That is correct.

[fol. 510] Q. All right. And at the time that you left the defendant in this car, was he alone? A. No, Officer Hartman was still there.

Q. And at the time that the defendant was carried in this liquor store, were he not carried in this liquor store by arresting Officer Hartman? A. I don't recall.

Q. You don't recall? A. No, I don't.

Q. You stated when you first apprehended the defendant in this case that you searched him for a gun; is that right? A. That is correct.

Q. But did you take the money from his pockets yourself? A. I took all the money from you.

Q. All the money? A. Yes, I did.

Q. Isn't there a department regulation, officer, which tells you not to take the money or personal property off a person?

MR. MURPHY: Object to that as argumentative.

A. No.

THE DEFENDANT: I am just asking if that is the case.

THE COURT: The witness has answered the question.

Q. (By the defendant) And when you asked the defendant in this case where he got the money, what did he tell you? A. As I recall, you replied that you got it from your check, that you cashed a check that day.

Q. I did what? A. You replied to my question that you had gotten paid recently, and that you had cashed a check that day, a pay check.

[fol. 511] Q. Did the defendant tell you that he worked for this money? A. I took it for granted if you got a pay check you were being paid for something, that you had worked for it, from that reply.

Q. And when the defendant asked you—told you in this case after you asked him why he had money in different pockets, what did he say? A. I don't recall.

Q. Did he not tell you that when he came into a city he generally distributed money out in different pockets so if he got robbed that he wouldn't lose all of his money? A. I don't recall that, sir, no.

Q. Oh, you don't recall that? A. No.

Q. And, also, didn't the defendant also tell you that same night at police headquarters concerning the money that he had distributed on him that he would go into a club and if he bought a beer or paid for a drink that he would fish out a $1.00 bill and pay for it? A. I don't recall the conversation of that type at all.

Q. Oh, you don't recall? A. Afraid not.

Q. And this money that was taken off the defendant which you said was the total sum of $176.00, was there any $20.00 bills among it? A. Any $20.00 bills?

Q. Yes. A. No.

Q. Was there any fifties? A. No.

Q. Was there any hundreds? A. No.

Q. Do you recall the defendant at the time he was [fol. 512] arrested told you that he lived in Pittsburg? A. I do.

Q. And if you called to Pittsburg he could verify the statement of where he got the money? A. Yes, that's correct.

Q. And did you investigate along that line? A. I did not investigate that, no.

Q. And do you recall the defendant in this case also telling you that there is quite a few other people in Pittsburg that owed him money, that he didn't have to rob anybody, that he could always go to Pittsburg and get money from them who owed him? A. I also recall you stating that you didn't rob anybody at any time either.

THE DEFENDANT: No further questions, your Honor.

MR. MURPHY: That is all I have of this witness.

THE COURT: Thank you. You are excused.

(Witness excused.)

THE COURT: All right, we will recess until 1:30. I will again admonish the jury not to discuss the case among themselves or with anyone else or form or express any opinion at this time.

(Whereupon, at 12:05 p.m. a recess was taken until 1:30 p.m. of the same date.)

[fol. 513] MONDAY, AUGUST 6, 1962
1:40 O'CLOCK P.M.

AFTERNOON SESSION

THE COURT: Stipulated the jury is all present. All right, Mr. Murphy.

MR. MURPHY: At this time I am going to offer the diagram in evidence as People's exhibit next in order.

THE COURT: Yes, the diagram can be admitted as to the names of the streets and the sequence of the streets, but not as to the distances between the points.

MR. MURPHY: Yes.

THE COURT: As they have been marked on the diagram. That would be Exhibit No. 28, is it?

THE CLERK: 28, your Honor.

THE COURT: All right.

(Diagram showing names of streets was received in evidence and marked People's Exhibit No. 28.)

MR. MURPHY: I think the six pictures are already in evidence, if I am not mistaken.

THE COURT: Let's see, 18 and 19, 23 and 24 and 25 and 26 are in evidence.

MR. MURPHY: And I would also offer the—

THE COURT: And 28 is in evidence.

MR. MURPHY: Yes, and I would also offer in evidence the coat, hat and shirt, which are No. 20, 21 and 22.
[fol. 514] THE DEFENDANT: I object, your Honor.
THE COURT: On what grounds?
THE DEFENDANT: On the grounds that they—on the grounds that it is immaterial to the case.
In this case here the people only stated the coat was only similar, similar to what the robber actually had on. They doesn't verify whether this was the coat or not.
THE COURT: All right, 20, 21 and 22 can be admitted into evidence.

(Whereupon, People's Exhibits Nos. 20, 21 and 22 heretofore marked for identification were received in evidence.)

MR. MURPHY: All right, the People will rest, your Honor.
THE COURT: All right, Mr. Banks.
THE DEFENDANT: Yes, your Honor. I will make my opening statement at this time.

OPENING STATEMENT ON BEHALF OF DEFENDANT

THE DEFENDANT: Ladies and gentlemen of the jury:

The defendant in this case is an out-of-town resident, his residence is at the Alpine Hotel in the City of Pittsburg. The defendant lives alone.
The defendant will prove that this is a case of mistaken identity, mistaken identity made or raised either from unconscience ignorance, forgetfulness and misplace of confidence.
MR. MURPHY: Well—
THE DEFENDANT: This mistaken identity were en-
[fol. 515] couraged by the police.
MR. MURPHY: I will object to that as argument, so far.
THE COURT: Well, I assume this is what he is going to prove.
THE DEFENDANT: And by the State's Attorney.

The defendant works and earns the money which was taken from him, which he would prove.

The State in this case has left so much out that it would have proved the defendant's innocence if all the facts would have been in, and he would not have to put on a witness or a defense.

I thank you, ladies and gentlemen.

As the first witness for the defense, I would like to call Mrs. Princess Nance.

PRINCESS NANCE,

called as a witness on behalf of the defendant, *being first* duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.
THE WITNESS: Princess Nance.
THE CLERK: Your first name?
THE WITNESS: Princess Nance.
THE CLERK: How do you spell your last name?
THE WITNESS: N-a-n-c-e.
THE CLERK: Thank you. Will you take the stand, please.

DIRECT EXAMINATION

Q. (By the defendant) Mrs. Princess Nance, where [fol. 516] do you live? A. The Bay Hotel, Pittsburg, 412 East Third Street.

Q. Thank you. And calling your attention to April the 27th, did the defendant on that day come to your hotel to do some plumbing work for you? A. Yes, you did.

Q. And did he also do some plumbing work for you on the 28th, 29th and 30th? A. That's right.

Q. How much did you pay him for this work? A. $140.00. Actually, it should have been $137.50, but I paid you 140.

Q. Did he submit you a bill for this labor and material? A. Yes.

Q. Calling your attention to a fact, did it come to your attention that the bill for this labor was dated wrong? A. Yes, it was.

Q. And did you correct that? A. Yes, I have it corrected here.

Q. Would you mind letting me see it, please? A. (Witness hands bill to defendant.)

THE COURT: Will you keep your voice up. We can't hear what you are saying, Mrs. Nance.

THE WITNESS: I can't hear you too well, either. I said, this is the statement of the bill.

THE DEFENDANT: May I have that marked for identification purposes, your Honor?

THE COURT: All right, that would be Defendant's "C".

MR. MURPHY: May I see it?

[fol. 517] THE COURT: Yes, will you show it to counsel?

THE CLERK: For identification only, your Honor?

THE COURT: Yes, for identification. It is just offered for identification at this time.

THE CLERK: Will this go in as a group, your Honor?

THE COURT: Yes, they might as well go in as a group exhibit, Exhibit "C" for identification.

(Group of documents consisting of bills was marked Defendant's Exhibit "C" for identification.)

Q. (By the defendant) Mrs. Nance, you own the Bay Hotel, don't you? A. Yes, I do.

Q. And was this payment in cash? A. Yes, three installments, three different times.

Q. And was the defendant to do some plumbing work for you the following weekend? A. Yes, install a sink.

THE DEFENDANT: That is all the questions I have of Mrs. Nance.

CROSS-EXAMINATION

Q. (By Mr. Murphy) You said these were in three installments. What were they? A. Well, he worked four days, and I gave him $20.00 one of the days, he didn't ask for it, I thought he might need it, and I gave him another $20.00; on the last day he worked I gave him a hundred dollar bill. I was only going to give him $97.50, but he

was going to do more work for me, so I said, "Well, just [fol. 518] keep that until Monday, or whatever day it might happen to be," but he didn't get back to do it.

Q. The last $100.00 was paid to him on what date? A. That was the 30th, I think. He worked from the 27th to the 30th; 27th, 28th, 29th and 30th.

Q. And that was paid in cash, you say? A. That's right, in cash.

Q. What kind of bills? A. Well, two $20.00 bills. The first was a $20.00 bill, the best I can remember, and the last was a hundred dollar bill. It should have been $97.50, and I gave him a hundred dollar bill.

Q. A $20.00 bill and a hundred dollar bill? A. Two twenties and one $100.00 bill.

MR. MURPHY: That is all.

THE WITNESS: Am I excused?

THE COURT: Yes, the witness is excused.

THE DEFENDANT: Yes, that's all.

(Witness excused.)

THE DEFENDANT: At this time I would like to call Mrs. Sarah Cunningham.

SARAH CUNNINGHAM,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

THE CLERK: What is your name, please?

[fol. 519] THE WITNESS: Sarah Cunningham.

THE CLERK: Will you spell the last name, please.

THE WITNESS: C-u-n-n-i-n-g-h-a-m.

THE CLERK: Thank you. Take the stand, please.

DIRECT EXAMINATION

Q. (By the defendant) Mrs. Cunningham, what is your address? A. 502 York Street, Pittsburg, California.

Q. And are you a part owner of the Fashionette Beauty Shop? A. I am.

Q. I would like to call your attention to May the 7th. Did the defendant install a hot water heater in your shop? A. You did.

Q. And did you pay him for that? A. Yes, I did.
Q. And what was that pay? A. $3.00 in cash.
Q. And do you recall as to this particular hot water heater was the defendant called at a later date to install another hot water heater in your shop? A. You were.
Q. And did you pay for that? A. I did.
Q. How much was that? A. $3.00.
THE DEFENDANT: No further questions.
MR. MURPHY: No questions.
THE COURT: All right, the witness is excused.

(Witness excused.)

THE DEFENDANT: I would like at this time, your [fol. 520] Honor, to call Mr. Joe Pollard.

JOE LOUIS POLLARD,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, please.
THE WITNESS: Joe Pollard.
THE CLERK: How do you spell your last name?
THE WITNESS: P-o-l-l-a-r-d.
THE CLERK: Thank you. Take the stand, please.

DIRECT EXAMINATION

Q. (By the defendant) Mr. Pollard, what is your business address? A. 325 East Third Street, Pittsburg, California.
Q. And do you own a garage? A. Yes, I do.
Q. Mr. Pollard, calling your attention to May the 30th, did you pay the defendant for working for you as a part-time helper in this garage? A. Yes, I did.
Q. And how much did you pay him? A. The last money I paid him was $40.00.
Q. Was this money in large or small bills? A. It was in small bills, it wasn't in large bills.
Q. Was they in the five, ten and one dollar category? A. Five, tens, I don't know. It seems like there was one

$20.00 bill involved, I'm not certain. It has been quite [fol. 521] some time back.

Q. Mr. Pollard, calling your attention—Did you ever know the defendant to have a large sum of money in his possession? A. No, not a large sum.

Q. Did you ever know him to carry as much as 150 to $200.00 on him, personally? A. I have known him to have that much.

Q. And, Mr. Pollard, I would like to ask you one more question. Was this payment in cash? A. Yes.

THE DEFENDANT: Thank you.

CROSS-EXAMINATION

Q. (By Mr. Murphy) You said that you knew the defendant to have as much as $150.00 in his possession? A. Yes.

Q. You don't know whether you—You have seen him carrying that much, or what? A. Well, I have seen that much money in his possession. He would have had to have carried it because he left the shop with it, but I just said I have known him to have that much. Now, where he carries it to, I couldn't say, but I have known he had it.

Q. Was that in recent—

Well, withdraw that.

Was that in the month of April or March or— A. Well, I would say this, as near as I can get at it, it was the day before he was arrested over here, because the day [fol. 522] before he was arrested I saw his personal financial, I shouldn't say, statement, but I saw the cash which he had in his possession which Mrs. Nance paid him for doing some plumbing work just below my shop. She comes to the place and asks me for a plumber, and I sent him down to do the job.

Q. And what denominations was that money in that you saw? A. It is hard to describe, sir.

Q. Was it a hundred dollar bill? A. No, it wasn't no hundred dollar bill, not that I seen. I saw some twenties, fives and tens.

Q. You don't know where he got that money then? A. Mrs. Nance paid him about one hundred thirty odd dollars, and I gave him $40.00.

Q. You don't know what denominations of money gave him? A. Oh, no, not exactly.

Q. You don't know whether she gave him $100.00 or two twenties or any other bill? A. No, sir; I do not. That is correct.

Q. This $40.00 that you said you paid him, was that in two installments or in one installment? A. Well, it was Monday and Tuesday, two installments.

Q. You paid him $20.00 each time; is that right? A. No, I paid him $25.00 one time and $15.00 the other.

Q. And that was Monday and Tuesday of what? A. It was April.

Q. Pardon? A. It was April. I said it was just before [fol. 523] he was picked up. That is why I happened to remember so close the date.

Q. In other words, if he was arrested on May 4th, Friday, it was the Tuesday immediately before that; is that right? A. Monday and Tuesday, immediately before that, that's right.

Q. That would be the 30th, the 30th of April and 1st of May, would that be right, looking at the calendar? A Well, I don't know when he was picked up, but it would be the same week he was picked up. That is the best I can say.

Q All right. You say you paid him $25.00 the first time, that would be on Monday; is that right? A. Yes.

Q. And that was a twenty and a five? A. Yes.

Q. And then you paid him $15.00 on Tuesday. Was that three fives or a ten and a five? A. Yes, I imagine so, that is as close as I can remember.

Q. Well, is it a ten and a five or three fives? A. I would suggest three fives because that is the way I usually—

Q. You don't specifically remember; is that right? A. No, sir, not exactly.

Q. Well, you said in your direct testimony that it was on May the 3rd, or, rather, the question was asked you, did you on May 3rd pay the defendant for work done. A. Well, now, to make it definite so there will be an understanding, I paid him two days prior to the time that he was arrested because it was kind of amazing to me that he was picked up.

[fol. 524] MR. MURPHY: Well, I will ask that the remarks of the witness be stricken as to being amazed.

THE COURT: Yes, that can be stricken.

Q. (By Mr. Murphy) Do you remember a specific date? A. No, not specifically.

Q. You say it was a Tuesday, Monday and Tuesday before he was arrested? A. Yes.

Q. Or the day you were talking about? A. Yes, that's right.

MR. MURPHY: All right, that is all.

REDIRECT EXAMINATION

Q. (By the defendant) I would like to ask you one more question.

Did the defendant in this case use your shop for receiving telephone calls? A. That is correct.

Q. Calling in for work and stuff like that? A. Yes.

THE DEFENDANT: Thank you. No further questions.

THE COURT: That is all. The witness is excused. Thank you.

(Witness excused.)

THE DEFENDANT: I would like to call Mrs. Thelma O'Hara.

THE COURT: All right.

[fol. 525] THELMA O'HARA,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

THE CLERK: State your name, please.

THE WITNESS: Thelma O'Hara.

THE CLERK: Thank you. Will you take the stand, please.

DIRECT EXAMINATION

Q. (By the defendant) Mrs. O'Hara, where do you live? A. 561 Carpina Street, Pittsburg.

Q. Calling your attention to May 3rd, 1962, did the defendant on that day do some plumbing work for you? A. Yes.

Q. And what was this work? A. He unstopped the commode, unstopped the bath and head for me.

Q. And did you pay him for this work? A. Yes, I did.

Q. And how much did you pay him? A. Twelve dollars and fifty cents.

Q. Was this in cash? A. Yes, it was.

Q. And this was on the 3rd of May? A. 3rd of May.

THE DEFENDANT: Thank you. No further questions.

CROSS-EXAMINATION

Q. (By Mr. Murphy) Was this a $10.00 bill? A. It was a $10.00 bill, two ones and 50 cents.

[fol. 526] Q. Ten, two ones and fifty cents? A. Yes.

MR. MURPHY: That is all.

THE COURT: The witness is excused.

(Witness excused.)

THE DEFENDANT: At this time I will call Officer Ticksman.

RICHARD TICKSMAN,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

THE CLERK: State your name for the record, please.

THE WITNESS: Richard Ticksman.

THE CLERK: Will you spell your last name, please?

THE WITNESS: T-i-c-k-s-m-a-n.

THE CLERK: Thank you. Take the stand, please.

DIRECT EXAMINATION

Q. (By the defendant) Mr. Ticksman, what is your address? A. 2096 Trafalgar Avenue, Hayward, California.

THE COURT: Just a minute on this. Will you and

Mr. Shaughnessy approach the bench. You can come too if you want, Mr. Murphy.

(Discussion off the record.)

THE COURT: All right, Mr. Banks.

First, just a statement to the witness. Before answering any of these questions, I don't know exactly what he [fol. 527] is going into, will you just answer the question directly and don't enlarge on the question unless Mr. Banks asks you to.

THE WITNESS: Very well.

THE COURT: And if he wants more information on the subject, then, Mr. Banks, you can ask for a little more.

THE DEFENDANT: Thank you, your Honor.

THE COURT: So we will hold the witness down to just what you ask, and that way he won't get off into other subjects that I spoke to you about here at the bench.

THE DEFENDANT: Okay, thank you, your Honor.

THE COURT: This is not a means of restricting you or the answers that you want, but in making sure the witness doesn't go too far once you give him the questions.

THE DEFENDANT: Thank you, your Honor.

THE COURT: We will notice the fact that he is of the Oakland Police Department, so we will limit him to as brief an answer as possible in answering your questions. Then you can go on from there if you want.

THE DEFENDANT: Thank you, your Honor.

Q. Mr. Ticksman, did you have the occasion to go to the Vince's Liquor Store on May—

THE COURT: Do you want to identify him, first, as to his occupation?

Q. (By the defendant) What is your occupation? A. Police officer, patrolman.

THE COURT: Employed by whom?

[fol. 528] THE WITNESS: City of Oakland.

Q. (By the defendant) Did you have occasion to go to Vince's Liquor Store on May 4th, 1962? A. I can verify the date by looking at my police report.

THE COURT: Would that be the Field report?

THE WITNESS: Well, we make a Field copy and then we type up a regular report.

THE COURT: All right, that would probably be Exhibit 8 or 9.

THE WITNESS: Do you wish to repeat the question?

THE DEFENDANT: Would the reporter read that question?

(Question read.)

A. I did.

Q. (By the defendant) To investigate a robbery? A. Yes, I did.

Q. Did you make a report of this robbery? A. Yes, I did.

Q. I would like for you to refresh your memory on this report. A. What do you mean by refresh my memory?

Q. Read this part of the report. A. (Witness does same.)

Q. Who is "R.P." in this report? A. "R.P."? Let me see. Could I hold onto that report so I can answer as you are asking me the questions? Are you referring to any particular line here, now?

Q. Yes, on the back of the report on line 4. A. That [fol. 529] would be "Reporting Party."

Q. And did this "Reporting Party" tell you that he reached under the counter and pulled a gun and struck the suspect on the hand or arm? A. Yes, he did.

Q. Did this "Reporting Party" tell you the robber had a mustache, according to—from your report? A. I don't recall whether he did or not. I didn't put it down.

THE DEFENDANT: Thank you. No further questions.

THE COURT: All right, Mr. Murphy.

MR. MURPHY: I just have one question.

CROSS-EXAMINATION

Q. (By Mr. Murphy) Did the "Reporting Party" sign that statement, or were these just your notes? A. This is just the report as he gave it to me.

Q. You made some notes as you talked to the "Reporting Party"; is that right? A. No, I wrote the report out in longhand.

Q. No, what I mean is there is some printed writing at the bottom of the page, and over on the next page, is that right? A. Yes. I meant to say "printing." I do most of mine in printing, I'm sorry.

Q. All right, you did that (indicating). Now, did you [fol. 530] make that (indicating)? A. You mean, this right here, sir?

Q. No, I mean this part down here, the summary at the bottom of the page and around the top over here. A. Yes, that is the original report. I put it all on this report. I didn't make any special notes on it, no.

Q. Yes, I mean, this is the whole thing right there. A. On these particular lines, yes.

Q. Was that signed by the "Reporting Party"? A. No.

Q. In other words, you just talked to him and then summarized the results of your conversation; is that correct? A. That is correct.

THE DEFENDANT: I object, your Honor, to the word "summarize."

THE COURT: Well, you can ask him.

Q. (By Mr. Murphy) Well, did you—Is that the way you did it, after talking to him, write down the story? A. That's correct.

Q. But you didn't give it to him to be signed, though? A. No.

MR. MURPHY: That is all.

REDIRECT EXAMINATION

Q. (By the defendant) Mr. Ticksman, did you on this same night, on May 4th, also investigate another robbery at Linden Liquor Store? A. Yes, I did.

Q. Did you make a report of that? Or maybe I can [fol. 531] refresh your memory. A. I don't remember on that. I believe I did.

Q. (Defendant hands paper to witness.) A. Yes, I did.

Q. And may I ask who is "R.P." in that report? A. That would be the "Reporting Party."

Q. Did the "Reporting Party" give you the statement on the estimated loss? A. Yes.

Q. Was that estimation 175 to $200.00? A. That was the estimate, yes.

THE DEFENDANT: Thank you. No further questions.

RECROSS-EXAMINATION

Q. (By Mr. Murphy) Again, Officer Ticksman, on this particular report, did you make it up the same way you did the other one, in other words, talk to the witness and then summarize what he told you? A. Correct.

Q. And did you give the document to him to be signed? A. No.

MR. MURPHY: That is all, your Honor.

THE DEFENDANT: No further questions, your Honor.

THE COURT: That is all. Thank you. You are excused.

(Witness excused.)

* * * *

[fol. 543] PROCEEDINGS IN OPEN COURT
3:00 P.M.

THE COURT: All right, stipulated the jury is all present.

All right, Mr. Banks.

THE DEFENDANT: Your Honor, it has been agreed between the State's Attorney and I to a stipulation, which I am quite sure that you could explain the stipulation for the record better than I could.

THE COURT: All right, let's see.

MR. MURPHY: Perhaps I can give the document to your Honor.

THE COURT: Yes. All right, it is stipulated by and between the parties to the action that if Officer Ayres of the Oakland Police Department were called as a witness he would testify that he was one of the investigating officers of the Three Point Liquor Store incident;

That he interviewed the reporting party, and the reporting party informed him that the suspect got a little better than 70 to $80.00.

[fol. 544] And it would be further stipulated that the report or the statement of the reporting party was not signed by the reporting party.

All right, so stipulated by the parties?

MR. MURPHY: That is agreeable, your Honor.

THE COURT: All right, fine.

THE DEFENDANT: At this time, your Honor, the defendant rests.

THE COURT: All right. Now, would you just approach the bench, Mr. Shaughnessy, Mr. Banks and Mr. Murphy?

(Discussion off the record.)

THE COURT: All right, Mr. Murphy, then, we will recognize you for your opening argument.

Let's see, about how long do you anticipate?

Do the People rest?

MR. MURPHY: The People rest.

THE COURT: And the defendant rests?

THE DEFENDANT: Yes.

THE COURT: All right, with the exception of your argument.

Now, we don't want the opening argument and your argument to come in the afternoon and allow Mr. Murphy to close by himself in the morning.

So either we want all of the argument this afternoon or we will just take the opening argument of the prosecution this afternoon, and let both you and Mr. Murphy speak in the morning.

[fol. 545] THE DEFENDANT: That would be okay.

THE COURT: You understand what I mean by that?

THE DEFENDANT: Yes.

THE COURT: So there is no possibility of the matters that Mr. Murphy speaks of being fresher in the jury's mind.

THE DEFENDANT: Okay.

THE COURT: For that purpose, we would like to get a little idea as to the time as to how far we will go.

How long do you anticipate?

MR. MURPHY: My opening argument won't be longer than 20 minutes at the most.

THE COURT: How long would your argument be?

THE DEFENDANT: I imagine about an hour.

THE COURT: And you would want some time to close?

MR. MURPHY: Yes.

THE COURT: Under the circumstances we will just have the opening argument this afternoon and your argument, Mr. Banks, and the District Attorney's closing argument and instructions tomorrow.

THE DEFENDANT: That's right.

THE COURT: All right, Mr. Murphy.

OPENING ARGUMENT ON BEHALF OF THE PEOPLE

MR. MURPHY: May it please the Court, Mr. Banks, and members of the jury:

As you know, we have here the defendant charged with [fol. 546] three counts, the first count being that of attempted robbery, and two counts of robbery.

Now, the offense of attempted robbery is an intent to do a particular act combined with some overt act carried out by the person with the intent directed toward the completion of that intent which is interrupted or interfered with for some particular reason.

Robbery is the taking of the personal property of another from his person or immediate presence, accomplished by means of force or fear.

In one case we have attempted robbery; in the other case, the other two incidents are actual robberies.

Now, taking the first count of the information, that is, involving the Vince's Liquor Store, you will recall the evidence in that count was that about 11:00 o'clock on the evening of the 4th of May Mr. Roger Wong was at that time working at Vince's Liquor Store, which is located at 12th and Peralta Streets in the City of Oakland.

Also working there behind the counter was a man named Harry Jow.

Wong, you will recall, testified that about 11:00 o'clock there were several people in the liquor store. That the man came in, walked up to the counter, and the first thing

that Wong knew about it was that he heard a statement to the effect that the man wanted all the money.

I think you also heard a statement about, "Do you want [fol. 547] to die?" And when he looked up, he saw the man standing in front of him. He identified that man as the Defendant here, Mr. Banks. He was standing on the outside of the counter, and he appeared to be talked to Jow, who was on the right-hand cash register.

Wong further testified that Jow started to give him some money, or, at least, he started to open the cash register. At that time, he said he pulled out his gun, which he had underneath the counter, and hit the Defendant on the hand with the gun.

Now, he also described the Defendant when he saw him as standing with his right hand in his coat pocket, right-hand coat pocket, with his hand resting, I think he described it on the bench up there, on the counter of the liquor store.

He hit him on the back of the hand, as it appeared to be in the coat pocket. He said the Defendant stepped back and made some remark about, "Go ahead and shoot," or words to that effect. And he turned around the left the store.

Now, then, Mr. Jow testified. And he said he was at the other cash register at the time the man came in and told him to give him all the money. That he made some remark to him, and the Defendant repeated the statement that he wanted all the money.

I think he made a statement about, "Do you want to die?", or words to that effect. That then he saw his partner there, that is, Wong, hit the man with a gun.

Jow also testified that the Defendant here is the man who was in the liquor store on that particular occasion. The next count took place at the Three Point Liquor Store, [fol. 548] and this happened around 11:15 that same evening, the 4th of May.

The first witness on the second count was Mr. Perry, Robert Perry. He testified he was on duty at the Three Point Liquor Store, which was located at 16th and Peralta, and, incidentally, the location of the liquor store appears on the diagram which, I think, is People's No. 28.

So he said that when this man came in, he came up to the counter, had his right hand in his right coat pocket, and he told him to empty the till, to "Give me everything." He also said he thought he was kidding, and the man said, "I am not kidding. You don't value your life."

He said at first that he gave him part of the money, and the man said he wanted all of the money. He then said he gave him all of the money that was in the till. The man then backed out of the liquor store, and then went toward 16th Street when he got outside.

Perry also testified that at the time this happened two other men were in the liquor store, or one man was up at the counter, the other man was coming in.

And while the man who had robbed him was going out, he almost backed into the man coming in. And Mr. Perry also positively identified the Defendant as the person who had committed the robbery.

In fact, one point I remember on cross-examination, he made the statement that he thought he would know the man who done it in a hundred years.

[fol. 549] We also then had the next witness, who was Mr. Griffith, on the same count, the Three Point Liquor Store robbery. He said he had been up at the—he was up at the counter, and he heard this man demand the money.

He heard him say, "Do you want to jeopardize your life? Give me the money."

He also testified the man's hand was in his right coat pocket, and he testified to seeing the man with the money in his hand and going out of the store. And he said that when he got out of the store he went towards 16th Street.

The third witness on the same count was Mr. Jones. He testified that he was coming in and the man coming out had money in his hand.

Remember from the witness stand he had his hand raised, he raised his hand up like that (indicating), and he said he almost backed into him as he was going out. And he also identified the Defendant as the person he had seen in the liquor store at that time.

He also recalls the statement, "Don't reach for nothing. I'm desperate."

That particular robbery was around 11:15 in the evening. About 11:30 the same evening there was another robbery at the Linden Liquor Store, which is located on 16th Street, 16th and Market. About 11:30, or thereabouts, Mr. Pauletich, who is one of the owners of the liquor store, was on duty. He said a man came into his liquor store, came up to the counter and demanded the [fol. 550] money.

Again, this witness testified that the man had his right hand in his coat pocket. He said his mother was in the liquor store at the time and she came up and wanted to know what was going on.

And Pauletich said, I believe that he said to his mother, "He wants the money." And she got the money out of the cash register and gave it to the person who had demanded it.

Pauletich also testified that the man who was in the store on that occasion was the Defendant. Pauletich also testified that about half an hour later some police officers brought a man to the store and asked him if this was the man who had been there earlier and committed the robbery, and he testified that he was. He identified him on that particular time.

Then you had another witness whose name was Sam Slaise. He said he was coming up 16th Street toward Market at that time. And as he got near the liquor store the man came out and went east on—or, rather, west on 16th Street toward Chestnut, which is the next street.

He said there was some conversation with Pauletich, and he said he followed the man down to the corner of Chestnut, where he turned north.

He went about halfway up the block, and then he said he saw a car pull out of there and turn east on 18th Street. He didn't see the man going up the street any more.

Now, a short time after that, a man walked into the [fol. 551] Sobek's Liquors, which is at 2100 Market, and at the time the person behind the counter was a man named Coatsie Smith. And Mr. Smith testified that about a short time before 12:00 midnight, on the 4th of May, the man walked into the liquor store.

There was some preliminary conversation as to, I think he asked him if he owned the store, then he asked him, "Do you have a gun?" Mr. Smith asked him, "Why?" And he said, "Well, I just might want to hold you up."

At just about that time a police officer walked into the liquor store and placed the man under arrest.

Mr. Smith testified that the man in the liquor store on that occasion was the Defendant here, Fred Banks. Smith also testified that the officer searched the man there, and he saw money in different pockets at the time.

Mr. Smith also testified that the officer made a statement to him, "You look like a suspect in some other robberies." And he said that when that statement was made to the Defendant by the officer, that the Defendant made no reply.

Now, the main issue, as I am sure all of you recognize in this case, is one of identification. As to whether the robberies actually occurred, I don't think there is any question about that from the evidence.

The real issue is one of "Was the Defendant here, Fred Banks, the person who committed those three offenses that he is charged with?"

Now, in any identification, I think there is a question [fol. 552] for the jury to decide as to how good the identification is. There are many factors in identification which may tend to improve the faults of the identification or to make it less good.

For example, one thing would be the opportunity of the person who was doing the identification to observe the person who committed the particular offense.

In this case here, there seems to be no difficulty there at all. This is not a case of the momentary identification which sometimes happens, where the witness might see a person for just a fraction of a second. Or, possibly, the kind of a case where the man comes in, produces a gun and orders the victim to lay down on the floor, and that is the only time that the witness has to see the person.

But, in this case, there is no question about that. On each of the three counts the man was standing right there in front of the particular liquor store man and the witnesses in the liquor stores, and there was good opportunity to observe the person.

Another thing is the distance. In some cases of identification, possibly the identification is made from across the street or some considerable distance. Here it is just a few feet, just the other side of the counter in the liquor stores.

Another factor which would tend to prove the quality of identification would be the number of persons, the number of witnesses making the identification.

Here, on the attempted robbery of Vince's Liquors, you have two witnesses who have identified the Defendant. At [fol. 553] the next one, that is, the Three Point Liquors, there are three persons, three separate witnesses, all of whom have identified the Defendant as being responsible.

And that the third liquor store, Linden Liquors, there was one witness who has testified that the Defendant was the person.

Another factor that comes up is the next time the witness sees the person that he has identified, in this case on the part of the witnesses from Vince's Liquors, the two Chinese persons and the three witnesses from the Three Point Liquors, those four persons viewed a lineup the following day, and all of them testified that they then identified the Defendant.

So it isn't the kind of case where, perhaps, the suspect isn't found for weeks or months, possibly, and then the witness has to remember from the time the thing happened a month or two months later at which time he first viewed the person again.

So, this ain't that kind of a situation. This is seeing the person the very next day when the face of the person would naturally be fresh in the witnesses' minds.

In the case of the Linden Liquors, it was only half an hour, because the Defendant here was arrested at the Sobek's Liquors and brought back within a half an hour to the Linden Liquors, where he was identified by Pauletich.

Now, another factor which I think you can consider here is this was not a situation where before the lineup, at which the witnesses identified the Defendant, they saw any pictures. No pictures were seen by any of the wit- [fol. 554] nesses before they all went up to the lineup and they viewed the persons in the lineup.

In some cases where they don't find the responsible person right away, the officers may have a group of pictures and show them to the witnesses and see if they can pick out a picture out of the group of pictures.

This is a way, or a process, or a means of trying to find the person responsible for the particular offense.

Another factor, which I think is important in this particular case, is the similarity in the operation in each of the three cases, in each of the three robberies, rather, the attempted robbery and the two robberies.

In each case the testimony is that the person committing it had his hand, his right hand, in his coat pocket. And in each case there is testimony that he had a sport coat on. And in each case there is testimony that the person had a hat on, dark colored hat, which I think is rather interesting and rather important in a case like this. They are all committed in each the same way.

Another important factor, I think, is that they all happened within a short period of time, the same area, within the same area, as you can see from the map.

And also, that the Defendant was actually arrested a few blocks, as you can see from the diagram, from all of the—or from the three counts with which he is charged.

Now, Officer Nielsen testified to the arrest of the Defendant which took place at the Sobek's Liquors a short time before midnight. And he testified to the denomina-
[fol. 555] tions of money taken from the Defendant.

He said that the Defendant had $176.00 on his person. And he said that, I believe, there were seven ten-dollar bills, fifteen five-dollar bills, and thirty-one one-dollar bills.

And he testified that that money was taken from various pockets of the Defendant. I think he described both pants pockets, a shirt pocket, and a wallet.

I suggest to you that it is quite unusual for a person to have that quantity of money distributed around in different pockets, crumpled up, as described by Nielsen.

And also you will recall the testimony of Pauletich—I believe it was Pauletich—that part of the money taken from him consisted of, I think he said—if I am not mistaken—about thirty-some-odd one-dollar bills.

You can check the record on that, but I believe that was the testimony.

Now, another factor which I think you can consider in a case of this kind is the failure of the person charged to take the witness stand and testify in his own behalf.

I think you will be instructed on that by the Court, and I think the instruction is to the effect that if a person does not see fit, which he, of course, does not have to do, to take the witness stand to deny evidence that has been presented against him, that you, as the jury, may consider that that evidence may—you can take that failure to testify as indicating that the Defendant would be unable to deny it.

[fol. 556] Well, at any rate, the instruction will be given to you on the person's failure to take the witness stand, and you will, I am sure, understand it and be able to apply that to this particular case.

Well, ladies and gentlemen, that is the evidence in this case. I submit that the evidence proves beyond any reasonable doubt that the Defendant in this case is guilty of the three offenses with which he is charged.

Thank you.

THE COURT: All right. Do you want about an hour for your argument, Mr. Banks?

THE DEFENDANT: Yes, in the morning.

THE COURT: Very well.

THE DEFENDANT: And I would like to make a motion, your Honor, later on.

THE COURT: All right.

We will recess, then, until 10:00 o'clock tomorrow morning.

I will again admonish the jury not to discuss the case among themselves or with anyone else or to form or express any opinion at this time.

See you in the morning.

(WHEREUPON, at 3:25 o'clock p.m., a recess was taken until 10:00 o'clock a.m., Tuesday, August 7, 1962.)

[fol. 557] PROCEEDINGS IN CHAMBERS
OUTSIDE THE PRESENCE OF THE JURY
3:29 P.M.

THE COURT: All right, Mr. Banks.

THE DEFENDANT: Your Honor, I would like to make a motion at this time to advise the jury of a directed verdict on the grounds the State failed to prove its case.

THE COURT: A directed verdict?

THE DEFENDANT: Yes.

THE COURT: And just for the record, you are making a motion for a directed verdict on each of the three counts?

THE DEFENDANT: Yes, sir, your Honor.

THE COURT: All right.

Well, the motion will be denied.

Anything else?

THE DEFENDANT: No.

THE COURT: All right.

[fol. 558] TUESDAY, AUGUST 7, 1962
10:00 O'CLOCK A.M.

THE COURT: Stipulated the jury is all present.

Ready for your argument, Mr. Banks?

THE DEFENDANT: Well, yes, your Honor.

ARGUMENT IN REPLY BY DEFENDANT

THE DEFENDANT: Good morning, ladies and gentlemen of the jury:

If you will bear with me for a few moments, I will try to go into the details of this case.

Now, all of you heard Mr. Wong and Mr. Jow each say that Mr. Wong hit the robber on the hand.

Mr. Wong and Mr. Jow both stated that they did not give this information to the police, that he had taken his gun from under the counter and hit the robber on the hand or arm.

Now, I questioned him along this line of this particular statement which he made, and he denied that he didn't give this statement, his partner must have give that statement.

And when his partner had taken the stand, Mr. Jow, his employee, he stated that he didn't give him no such statement.

But, yet, you heard the officer get on the stand yesterday and testify in rebuttal that Mr. Wong, the reporting party of the robbery, did make that statement.

And in that particular case, ladies and gentlemen, under the rule of impeachment, it have proved to the jury that [fol. 559] Mr. Wong do lie. He is not a truthful man in making these statements to the jury.

And we examined different evidence which came about, and as I stated before that the robber in this case is unknown to me, although I am accused of this particular crime which they said was committed, which to me I do not know.

But under the rules of impeachment it is not necessary, however, that the two statements be diametrically opposed to each other to be inconsistent.

It may consist in definite or certain inaccuracies in which the testimony is given on the same subject on the two occasions.

In this case if Mr. Wong and Mr. Jow, which have been proven in this court here, make untruthful statements, there are other statements also which could be laid to their door as untruthful.

They say that the robber had a brown hat on; yet, when it comes here on the stand, the robber has a black hat on.

And what do they give for that? They tries to go around in circles and say that they didn't even say the robber had a hat, or they didn't remember, which these ladies and gentlemen of the jury know that is important in any case in identification.

I questioned him several times concerning the hat, and he still insists that he didn't remember.

But when I brought the transcript out and showed him at the preliminary what he had stated on the color of the hat, he says he didn't even remember making that statement.

But, yet, he comes to court here and asks you to convict [fol. 560] a man on that kind of evidence which is circumstantial, that the hat was similar to the one the defendant had on.

About the coat, I questioned him concerning the coat the robber had on.

He says he looked at the coat through the little window. He identified the robber in every respect to all of his specifications, the coat, the hat.

But when Mr. District Attorney asked him, "Say, do this resemble the coat that the robber had on," he said, "Yes."

He didn't say positively that is the coat that the robber had on, he said it is similar.

But at the show-up, which you was well aware that the defendant had on a checkered coat which all of you members of the jury seen a picture of this particular show-up, the defendant was the only person in the show-up with the checkered coat on, checkered sport coat.

And the State's Attorney asked him, "Is this coat similar," and he came back with the reply, "Yes, it is similar."

Ladies and gentlemen, in order that you may impeach a witness's story, it entails the following, and you will find it in the law book stated in such simple simplicity:

> "Should a witness identify at a trial a coat similar to the one worn by the one sought, he may be impeached by showing that at the preliminary examination he identified the coat positively."

And what do they mean by "impeachment"? Impeach- [fol. 561] ment, ladies and gentlemen, in this case is the accuracy in which peoples describes an event.

If they describes it falsely to another and later it turns out that they made such a contradictory statement, it will fall upon impeachment.

> "Impeachment is the inducement of proof that a witness is unworthy of belief."

So, in this particular case, ladies and gentlemen, what did Mr. Wong say?

He says, "The robber left my store, he go out, he turns, he go up Peralta."

He makes that statement on the stand under oath. When I show him the transcript where he had made in the preliminary:

"QUESTION: Which way did the robber go, Mr. Wong?

"ANSWER: I don't know.

"QUESTION: Did he turn north?

"ANSWER: I don't know.

"QUESTION: Did he go up Peralta?

"ANSWER: I don't know. I didn't even see him leave the store. They tell me he went out the front way."

Those are his words, not mine. I wasn't there.

So, ladies and gentlemen, if you recall, I questioned him closely about the robber having a mustache or a scar.

I examined all of the reports that they gave to the police [fol. 562] which was—some of them was wrong.

But of this particular report, I have yet to find where he gave information to the police that the robber had a mustache or a scar or even had gold in his mouth.

The fact of the business is he even stated he didn't even give the police the type of hat the robber was wearing.

Surely, the police would have put that in his statement in order that they may track down the robber.

But what do he say? "The robber is five foot six, weighs 150 to 160 pounds."

The defendant in this case is five foot ten and a half, ladies and gentlemen, and he weigh 180 pounds.

MR. MURPHY: Object to that as no evidence of the exact description of the size and weight of the defendant.

THE COURT: There is no evidence as to the size and weight of the defendant.

MR. MURPHY: May it be stricken?

THE COURT: Yes.

THE DEFENDANT: I questioned him also concerning the shirt the robber wear. He says, "It was a flowered shirt."

At the time that this came up at the preliminary, another lawyer, which was handling my case at that time questioned him concerning this shirt.

He made the statement that it was a flowered pattern shirt, that it had flowers on it.

And as you ladies and gentlemen see that this shirt [fol. 563] doesn't have flowers on it, no type of flowers.

And now as you may ask yourselves, "What would Mr. Jow get out of backing up Mr. Wong's story?"

You ladies and gentlemen must remember that Mr. Jow is employed by Mr. Wong, and, quite naturally, he is going to rally to his boss's defense.

And to make certain that Mr. Jow and Mr. Wong both would be able to identify the defendant in this case as the robber, what do the State's Attorney do?

He call him in his office, give him a picture of the defendant, show it to him, show him the clothes, show him the evidence and say, "Now, this is what the robber had on."

All of that was proven on the stand.

The State's Attorney also showed him the picture with the scar on the victim's face and the mustache.

During the trial of the picking of the jury, what did he do?

He sit them in the courtroom, let them see the defendant in the case.

Why, that was impossible for them not to take the stand and continue to make an identification.

But did they say they were fully positive like the State would have them make the identification?

No. They said, "He resembled;" "His coat resembled;" "His hat resembled."

They changed their story quite frequently from what it [fol. 564] was at the preliminary.

I asked Mr. Wong did he see any gold in the robber's mouth. Quite naturally if the robber talked as much as he said the robber did, they would have seen the gold in his mouth.

He was looking right at his face, so they claimed. They can see scars on the face, they can see the mustache, so they claim.

As I have been talking to you, ladies and gentlemen of the jury, I am quite sure that you have seen the gold in my mouth, and it wasn't no hard thing to do.

I wasn't there, so the only thing I can do is cross-examine, stick by the rules of cross-examination.

The only thing I can do is to try and find discrepancies in the stories to prove the point that Mr. Wong would tell a lie, a lie which they expect reasonable men and women to believe.

Why? Maybe because he is a business man. Maybe he believes he can go further.

Maybe because he believes if they caught the robber, someone that had money, he could get his money back; whereas, if you catch a robber, and he identified someone with no money, it is impossible for him to get the money back.

But in this case the defendant happens to have money, so maybe he will be looking forward to recovering his losses. Who knows?

Ladies and gentlemen, we will go to the next step, the identification which a Mr. Perry claimed that he picked [fol. 565] the defendant out of the lineup.

From the records which I have obtained and the statements which Mr. Perry made at the preliminary hearing were statements to the effect, especially one, involving money.

This is a statement which he made at the preliminary which I happened to be present. He said the robber had taken 90 or $100, as he gave it in an estimate.

I questioned him along this line concerning whether the robber had taken this amount from him, and he said, "Yes."

On the stand, he says, "I don't remember making any other statement."

He says, also, that he told the police on the night of the crime that he had lost 90 or $100.

Well, I questioned that because I wanted to get to the truth to find out about this loss.

I asked him on the stand on a number of occasions, as you ladies and gentlemen of the jury heard me.

He says he gave an estimate to the police that about 90 or $100 was lost.

I questioned him along that line and even let him read the statement which the police had made which was taken from him at that time.

The reporting party had gave to the police an estimate of 70 to $80.

This witness I had subpoenaed to call, but due to the fact that he was on his vacation and unable to be here, [fol. 566] the State agreed to a stipulation that he would testify on the stand under oath—

MR. MURPHY: I think the stipulation ought to be accurately stated if counsel is going to relate it. It was, "A little more than 70 or $80."

THE COURT: Well, let's hear the stipulation as he stated it.

MR. MURPHY: He just did. He stated, "Between 70 and $80," as a matter of fact.

THE DEFENDANT: Well, your Honor, that is what is in the statement, itself, "70 or $80."

THE COURT: "70 or $80."

THE DEFENDANT: Yes.

THE COURT: As I recall, it is "more than 70 or $80," isn't it? The stipulation is here.

> "It is stipulated that if Officer Ayers were called as a witness he would testify that he was one of the investigating officers of the Three Point Liquor incident, that he interviewed the reporting party who stated that the suspect got a little more than 70 or $80.
>
> "And it was further stipulated that the report was not signed by the reporting party."

THE DEFENDANT: So, this statement, ladies and gentlemen, as you see, he did not remember making.

We will now go to the lineup from this particular statement.

[fol. 567] He says he picked the defendant out of the lineup, saw his coat, saw the defendant with the hat on.

When he got on the stand, did he say positively that that was the coat or hat? No. It is similar.

In response to the District Attorney's question, he says, "It is similar," but at the lineup, he said, "I am positive."

And again we fall into the category of impeachment. Impeachment of a witness is inconsistent statements which are made under oath.

And in this particular case it was made two places, here and at the preliminary, each time under oath, each time inconsistent with each other.

As you notice when I questioned him on the hat, he said at the preliminary, "It was brown," but when he was on the stand, he said, "brown or Oxford grey."

And I will refresh your memory, ladies and gentlemen, if I may. I said, "Brown or Oxford grey?" And he said, "Yes."

And I said, "Do you recall what you said at the preliminary," and he said, "I didn't use the word 'Oxford grey' at the preliminary."

Why, that is an inconsistent statement.

Then I asked him, "What story did you give the police," and he said, "I don't remember."

Ladies and gentlemen, as the offense is being reported to the police, it is a known fact that the officer in making out his report tries to get all of the information that [fol. 568] would enable him to track down a suspect.

So I asked him along this line, "Did you give to the officer a good and fair description of the robber," and he said, "Yes."

I questioned him along that line, but I notice from his statement to the officer he doesn't make the statement here that the robber had a mustache, and you don't grow a mustache, ladies and gentlemen, overnight.

But the next day when they pick up a suspect, bring him in, he has a mustache, goatee, a little bit of hair on his chin.

And what do he say when you ask him about that, "I don't remember nothing. I just saw his eyes. That's all I remember."

But his face wasn't covered up. He said he was watching, particularly looking at him in the face, staring at him in the face.

Do you think that a man could forget all of the features of a man's face in that short of a period? I don't think so.

Surely, ladies and gentlemen, that come under the rule of impeachment.

As I go along, I will quote from some of these books. I didn't write these books, ladies and gentlemen. I just study them, ladies and gentlemen.

Again, impeachment.

> "A witness may be impeached where he has given certain testimony in a criminal trial by showing that when he ask a question at the preliminary [fol. 569] examination calling for the same information he replied that he could not remember."

But when he get on the stand and he remember, that is inconsistent.

Ladies and gentlemen, I will tell you again that the State in this case have encouraged all of these witnesses that you see taking the stand against the defendant to make an identification.

Take Mr. Griffith for an example. He said they brought him to the State's Attorney's office, showed him pictures of the defendant, which I showed to the jury, had them admitted in evidence.

They showed him the pictures, discussed the case, talked over the evidence, showed him the coat and hat so when he come to trial he would remember.

"Why do the State want these witnesses to remember," you may ask yourselves.

One reason why, ladies and gentlemen, is any person that knows anything about his constitutional rights knows when he is accused of something which the State is unable to prove that the State, the officials and the people so accusing him is liable in a court of law.

And why do they want to get a person convicted after such accusation? Because if he is convicted, then there can be no damage suit against the State, against the people who are working for the State. They also have a chance to be sued.

They comes and tells the jury, tells the witnesses, "Yes, [fol. 570] this is the party. Look at him. He got on similar clothes, he got on a similar hat."

And then the witnesses say, "Yes, that is what the victim had on."

Take Mr. Jones which also appeared on the stand. He says he don't remember.

I questioned him, also. I asked him, I said, "Did the District Attorney go over the coat with you?" "Yes."

Those are his words. I wasn't there.

"QUESTION: Did you look at the coat? Did he show you the hat?

"ANSWER: Yes.

"QUESTION: Did he show you the shirt?

"ANSWER: Why, sure, he showed it to me."

All these people were called off the job who were working to show them this evidence.

"QUESTION: Did he show you a picture?

"ANSWER: Why, sure."

But why was the State interested in showing them this? Because they wanted to get a conviction.

They didn't want the witness to come into court as Mr. Slaise did and say, "It was dark, I couldn't identify nobody." They didn't want that.

That is why they coached him.

MR. MURPHY: Well, I am going to object to that. There is absolutely no evidence of any coaching in this [fol. 571] case. I object to the statement.

THE COURT: No, there is no evidence of coaching.

THE DEFENDANT: Ladies and gentlemen, as you could see from Mr. Jones's statement, you heard him, ladies and gentlemen, when he said the State showed him these things.

What other term could you use for it when the State shows you what they have?

"This has to be the fellow. This is the coat that the petitioner was wearing that night."

MR. MURPHY: I object to that. There is no evidence that the People said, "That has to be the fellow." There isn't a particle of evidence as to that.

THE COURT: No. As I recall, no witness made that statement.

THE DEFENDANT: Ladies and gentlemen of the jury, if you will recall in this particular case, Mr. Pauletich said that his mother gave the robber the money.

I will leave you with only one question on that sub-

ject. If she gave the robber the money, surely she had a good look at the robber.

Also, why wasn't she called? Is it a possibility that she could not identify the robber?

But Mr. Pauletich was called. He admitted that he had talked with the inspector concerning this matter.

The inspector, he wasn't called to tell what conditions he talked to him about. All this was concerned in this case.

[fol. 572] So I questioned Mr. Pauletich along the lines about the money that he lost. He said on the stand, "I lost $165 to a robber."

I asked him not one time but several times about this amount. I asked him, "Was it exact?" He said, "It was an estimate."

I showed him a copy of this statement which he made also at the preliminary examination which stated the figure exactly.

In that statement he said, "$165," not approximately, but exactly.

I asked him about the statement he gave to the police. I asked him, I says:

> "Mr. Pauletich, did you make a statement to the police that you lost $175 to $200," and he said, "No, I don't remember."

So I asked him, I asked him, I says, "Are you sure," and then he comes back and says, "I do not know."

I showed him a copy of the officer's report, and I asked him if that was the estimated loss he gave to the officers. Then he said he didn't know what the officer put down.

But you heard Officer Ticksman on the stand right there yesterday, and he said that was the estimated figure that Mr. Pauletich gave him, that he wasn't writing it down from just out of the clear blue sky, he was writing what people were reporting to him.

I questioned Mr. Pauletich about the hat. He said the [fol. 573] robber had on a brown hat.

I showed him the hat the defendant had on in this case, which was a black hat, which you ladies and gentlemen of the jury all have seen.

Then he says, "It could have been a black hat," but at the preliminary he was definite that it was a brown hat.

That is a matter of record, ladies and gentlemen. But on the stand he said, "That could have been the hat." Why are they inconsistent?

I questioned him about the sport coat. I showed him a statement that he made to the police concerning the sport coat, and what did he say? "I didn't make that statement."

I showed him what he had said at the preliminary about the sport coat, which is a matter of record taken under oath, but what did he say: "I don't remember."

That is an old familiar phrase that people use in law cases which the State instructs the witness to say to any question because he can't answer. "I don't remember."

But as the book says you can impeach a witness because he don't remember, so I am allowing you ladies and gentlemen to take that under consideration.

Why would all of these witnesses somewhere along the line lie about different statements they have made?

Why would they come to court and say that "He looks like the man," when they were so positive at one time or another that "that is the man," but on taking the stand, "He looks like the man. I would know him any-
[fol. 574] where."

Isn't that a long way departure from the true facts?

As to Mr. Pauletich, I called Officer Ticksman to impeach his statement, and Officer Ticksman got on the stand and under oath swore that Mr. Pauletich did give him that statement.

It isn't the amount of money which he gave that was lost, it is the statement which he gave that he can't remember.

And, ladies and gentlemen, Mr. Pauletich, as you will recall, said that he reported to the police the robber had a mustache and a scar.

I examined the reports from top to bottom on all sides that the police had taken that night, and you will not see anywhere in these reports that he reported that

the robber had a mustache, scar, or even had any hair on his lower lip.

But you will find in there where he said that the robber had on not a grey or blue checkered sport coat, but a brown sport coat.

And as you will remember, Mr. Pauletich say he went to the door after the robber left his store, seen the robber go down the streets.

But not nary a time did he tell you that he said anything about "Follow the robber," or "Catch the robber."

The next witness that followed him, why, sure, was Mr. Sam Slaise. He gets on the stand, and what do he say?

He says, "Bill," and Bill turned out to be Mr. Pauletich, "said to catch somebody."

[fol. 575] I asked Mr. Slaise did he see any money in the robber's hand, which the District Attorney had asked him the same question.

I asked him, I said, "Did you see what color coat the robber had on," and he said, "No."

Well, ladies and gentlemen, isn't this quite obvious, if you can see money in the dark, you can easily see a light grey sport coat on a victim, on a man?

If you can see money in a man's hand in the dark, couldn't you tell whether he had on a light coat, light sport coat?

MR. MURPHY: Objection to that as testimony by the defendant as to the color of the coat. I think it is in evidence.

THE COURT: That is all right. This is just argument.

THE DEFENDANT: That's right, your Honor.

Surely, you could see that, but he stated, "I seen the money in the robber's hand, he was holding it up."

But he couldn't tell you what color coat the robber had on. The fact of the business is he couldn't identify anybody. So why was he called? What connection did he have with the case? That is still a mystery to me.

He sees somebody run out of the store, run down the street, get in his car.

He goes in the store, the man tells him, he says, "A man just robbed me."

We don't even know whether a robbery had even been committed. The only thing he can do is take what was said on hearsay. He hadn't seen the robbery being com-
[fol. 576] mitted. He hasn't identified anyone.

Ladies and gentlemen of the jury, I ask you again under the rules of impeachment, on impeachment of evidence, when a person is called as a witness and makes inconsistent statements and are proven out with known facts and records that some of his statements is false, you can impeach his statements through legal procedures.

I am not familiar, myself, with impeachment, ladies and gentlemen, I am just trying to learn how to defend and prepare cases to help myself when I fall into this predicament, this type of situation.

This has happened throughout America, ladies and gentlemen. There have been cases where they have had as many as 12 to 20 people to identify people positively, and they have been proven wrong, that the fellow didn't even commit the crime.

Even your great criminal lawyers, Judge Liebowitz, he had such a case where 20 people identified one man at different times going into banks, forging checks.

They pointed the finger at him and said, "Yes, that is the man," but when all the evidence was in, ladies and gentlemen, they found out that those 20 people were wrong.

There is a case where five people identified one person positively, "This is the man."

Those are case histories, pointing the finger at him and saying, "That is the man," but when all of the records was in, they proved that five was wrong.

[fol. 577] Now, we will take the statement of Coatsie Smith, ladies and gentlemen.

Remember Coatsie Smith got on the stand and stated that the defendant came into his store, which the defendant did.

The defendant at the time went in his store and asked this man for a pint of whiskey, and chatted with him in a conversation.

The police come in, picked the defendant up, searched him, find some money on him and take him to jail, he is arrested and charged with a specific crime.

The State says that someone is guilty of what had been happening.

Remember, the defendant was in the man's store approximately five minutes, but if you just look back over the whole case, ladies and gentlemen, the robber that night had on a brown hat and sport coat, which is common.

You see them every day when you travel to and forth from your home, same type of sport coat.

This robber had been going in people's store crowded with customers, telling him, "Say, give me the money," takes the money, runs out the door.

The robber walks in another store, says, "Give me the money," takes the money, goes out the door.

He goes in another store, all the customers are there, he takes the money and goes out the door.

And then the State says, "Now, this is similar. Here [fol. 578] come a robber, supposed to be robber," so they says, "Walks in a man's store and asks him, says, 'Have you got a gun? I am thinking about robbing you'."

Now, do that sound like the robber that has been robbing people up and down the street? This robber didn't ask in the other stores, and yet he asked the man did he have a gun.

In one store, as I recall the evidence, Mr. Wong said the robber in that particular case went in the store, stuck the man up and he got hit with a gun.

He didn't ask Mr. Wong, "Say, Mr. Wong, have you got a gun? I am going to rob you."

The State claims if the defendant would be that robber, would he have walked into this store here, told him, "Say, give me the money," and walk on out? He wouldn't care whether he had a gun or not.

Those are facts, ladies and gentlemen. Those are facts which you people can take into consideration on all of the circumstances.

Those are facts. They don't go together. Ladies and gentlemen, you all can see those facts don't go together, but the State tries to make you all believe they do.

The State says, "He walked in the store, talked with the man five minutes."

At the pace this robber was setting, he could have walked in the store, robbed the man, walked out and then gone before the police even got there.

[fol. 579] But, no, he didn't do that. This innocent fellow was standing there talking.

As you heard Mr. Smith say, he tells people the story about the girl getting killed there. I ain't never been in this store before, but I have been by the store, because most of the time, ladies and gentlemen, the Greyhound Bus Station isn't too far, about a block and a half from that man's store. They never tell you about that. The State doesn't try to show you where other circumstances are involved.

They just want to show you a series of patterns to build up the State's case.

See, that bus station it isn't too far from there, only a block and a half. The station is on San Pablo.

Another thing the State also does. It doesn't try to tell you from 22nd and Market down to 14th and Market that is a red light district.

You people in the city should be familar with the red light district. That is where all of the playgirls, sporting girls and all that hang out, all up and down that particular area.

When a man lives alone sometimes he makes—

THE COURT: Now, Mr. Banks, there is no evidence of all this you are talking about. Would you limit yourself to the evidence.

THE DEFENDANT: But, your Honor, we was in this particular area as the crime was committed in this particular area.

I think I would be entitled on the argument to show [fol. 580] what is in this particular area.

THE COURT: You were entitled to show it. You had your chance, but there is certainly no evidence as to anything in the area except what was brought out in the evidence.

THE DEFENDANT: Ladies and gentlemen, Mr. Jow in this particular case stated that the District Attorney called him from his home, from his mother's

home, to come to the District Attorney's office and showed him a picture.

MR. MURPHY: Well, I don't think that is the evidence at all.

THE DEFENDANT: It was admitted in evidence.

MR. MURPHY: I think the evidence was that some officers visited him at his home.

THE COURT: I think that is correct, yes.

THE DEFENDANT: But, anyway, ladies and gentlemen, he too admits that they showed him the picture of the defendant in this case about a week, about two and a half weeks ago now it has been. But he said it was a week and a half.

He said they showed him this picture. Why did they show him this picture? They have never brought out the purpose of why they were showing these people these pictures.

Why were they showing these people these clothes? Only one conclusion could be drawn to that, ladies and gentlemen.

They wanted the people in this case to identify the defendant. That is the only conclusion there would be for showing a person the pictures, especially when it is in- [fol. 581] volved in the trial, coming to trial.

Those are facts, ladies and gentlemen. You heard them yourselves right from the stand, ladies and gentlemen.

Ladies and gentlemen, the State's Attorney commented on why the defendant in this case failed to take the stand.

One reason I didn't take the stand, ladies and gentlemen, is that I didn't believe the State had proven its case.

It hadn't introduced any evidence here to show that the defendant was the robber suspect, was the guy running around robbing those people. They haven't produced any evidence.

They produced evidence that he looks like the man, he is similar, those clothes are similar. That is all the evidence they produced.

As you notice, ladies and gentlemen, from the record, Officer Nielsen got on the stand.

He say that he searched the defendant, found $176 in the defendant's pockets which was scattered on him in different pockets.

He also said that the defendant told him he had cashed the check, but he disputed Coatsie Smith's statement that the defendant told him that he had worked and got this money.

Coatsie Smith said he didn't tell the officer at the time in the liquor store, that the defendant didn't tell the officer at the time in the liquor store anything about a check.

All he heard the defendant say was that he made this money working, but the officer say the defendant told [fol. 582] him in the liquor store that he had cashed his check.

So he carried the defendant to one of the places that was robbed, according to my understanding of the case, and the defendant stayed in the squad car while he go inside and talk.

This pertained to the time that the defendant at that particular time happened to be there. He saw the officer talk to Mr. Pauletich.

Then he comes out and carries the defendant into the store, and the only fellow on the scene with the police officer is the defendant.

I had on the same hat and coat which was in evidence. Mr. Pauletich walked around the defendant and looked at him and say, "That looks like the man."

MR. MURPHY: Well, that is a misstatement of the evidence. He specifically said he did not say that, but he said, "That is the man."

THE COURT: Well, the jury has heard the evidence.

THE DEFENDANT: I am telling you what was said because I was there.

MR. MURPHY: Well, I will object to that as no evidence.

THE COURT: Yes, there is evidence that he was there.

MR. MURPHY: There is evidence he was there, but he can't say he knows what was said because he hasn't testified.

THE COURT: Yes, you would be correct, he can't give actually any facts except those that were given from the witness stand.

[fol. 583] THE DEFENDANT. Ladies and gentlemen, he say he carried the defendant to the police headquarters, and there he asked the defendant to remove from his pockets all of the items that he had in his pockets.

The defendant removed his billfold, removed money, removed his key, his key chain, his legal papers.

This officer counted the money, asked the defendant where did he get the money, and the defendant told him that he made the money working as a plumber.

I think if you ladies and gentlemen will recall, he also told him if he would call Pittsburg that he had people there to verify that they have paid him this money which he had. That is in evidence, ladies and gentlemen, that is a fact. The fellow stated from the stand those particular facts.

I asked the officer did he remember some of the conversation that the defendant had with him at that time. He says, yes, he could remember some of it.

And he said he recalled one statement that the defendant told him, that he hadn't robbed anybody, that he didn't have to rob anybody. I think that was his last statement which he made.

And I think he also made a statement, ladies and gentlemen, prior to that last statement that he didn't find no gun on the defendant, no knife, not any kind of weapon.

And the defendant questioned him also along the line about this conversation.

The defendant wanted to know if he could remember [fol. 584] the defendant telling him about how he fished one dollar bills out of his pocket in various places, taverns, when he go in taverns to buy drinks in order to keep from flashing a large sum of money.

He said he did not recall that statement, but they was made.

THE COURT: Now, this is testifying, Mr. Banks. Now, there is no evidence to that effect.

THE DEFENDANT: But, your Honor, I did question him along the line of conversations that he had with me.

THE COURT: That's right, and he stated he did not remember this questioning or the statement that you made.

So there actually is no evidence then of the statement having been made or of it not having been made.

THE DEFENDANT: So, ladies and gentlemen, we will go from there to some of the peoples that sacrificed their time to come down here to appear on this stand in my behalf and my defense.

Mrs. Princess Nance, she stated the money she paid the defendant.

She stated she owns the hotel, a very large hotel, and that defendant worked for her four days, 27th, 28, 29th and part of the 30th, four days, and he was paid $137.50.

Another witness, Mrs. Cunningham, stated that the following day before the defendant was arrested that she paid the defendant $6.00.

Mrs. O'Hara stated that on the same day, the night before the petitioner was arrested, she paid the defendant $12.50.

[fol. 585] Mr. Pollard, who owns a garage, stated the defendant works there part-time. He stated that he paid the defendant $40.00 two or three days prior to his arrest.

He also stated that the defendant the night before he was arrested had better than had close to $200.00 in his pocket. Those are facts, ladies and gentlemen, and, as you see, the petitioner, the defendant in this case makes good money.

He doesn't have to rob anyone. He works just like everybody else. He has an honest profession, plumbing, which has been testified to. He works.

So what would his purpose be of robbing anyone when only a day's labor or two days' labor he makes him a hundred dollars.

As plumber, as you know, ladies and gentlemen, makes anywhere in the neighborhood from $5.28 to $9.50 an hour.

THE COURT: Now, Mr. Banks, again, there is no evidence as to the hourly wage of a plumber.

THE DEFENDANT: So, ladies and gentlemen, from this statement in evidence and evidence that you have heard, and you heard how the people have gotten on the witness stand and not lied one time but several times, each witness have been caught in a number of lies, which have proved their testimony is unreliable, under the rules of impeachment, ladies and gentlemen, I believe from these statements that you have heard, each witness that has told you their story from the witness chair, each one of these witnesses, that their statements is unreliable.

[fol. 586] How many times, ladies and gentlemen, do we walk down the streets and we see someone that we think is some lifelong friend.

When we walk down the streets we just know that that is some lifelong friend that we have seen standing there on the corner.

We walks up to him and say, "Hello, Bill," "Hello, Miss so-and-so," and then it turns out different, not even be the fellow or the lady which you anticipated it to be, but somebody entirely different that you have never seen before.

But you would have at that particular moment thought that couldn't have been anybody else but them.

So that is all I can say in this particular case, that I didn't rob anyone.

MR. MURPHY: I object to that. Counsel cannot testify in his argument.

THE COURT: The statement put that way is, yes, testifying.

You certainly can tell the jury what kind of verdict you want from them.

THE DEFENDANT: So, ladies and gentlemen, after hearing all of the evidence, I don't understand how that you could arrive at any other verdict after the State has failed to prove its case but to bring in a verdict in favor of the defendant, that he is innocent.

Thank you.

THE COURT: All right, Mr. Murphy.

[fol. 587]

CLOSING ARGUMENT ON BEHALF OF THE PEOPLE

MR. MURPHY: Your Honor, Mr. Banks, members of the jury:

The defendant has said a number of things to which I would like to make as brief a reply to as I can.

The defendant has claimed here that all of the People's witnesses have been impeached.

Now, I would submit to you that counsel has gone to great lengths to bring out what might be call slight discrepancies in the testimony.

For example, the witness Pauletich said $165.00 was taken. That was his testimony from the witness stand.

Counsel brings out that on a police report taken five minutes or so after this happened, he said it was somewhere between 175 and $200.00. Actually, there is evidence that that report was not even signed by Pauletich.

I suggest to you that is an extremely minor discrepancy.

It can easily be explained by the simple fact that five minutes or so after the robbery the witness is not going to probably have any exact or very accurate idea of how much was taken, and later on he makes the statement at the preliminary and at this trial it is $165.00.

I don't think that is any substantial discrepancy brought out by the defendant.

Counsel spent a lot of time talking about the hat. For example, this is, he says, a black hat.

Well, keep in mind that these robberies occurred late [fol. 588] at night. It is not a situation where this is a clear black as compared to a clear brown.

This is a hat which is, as you can see, a rather nondescript color. I think it is easy to describe that, especially at night, as a brown hat.

Anyway, I think that is a very minor point brought out by the defendant.

Now, actually, when you hear several witnesses talk about a particular thing that has happened, I think it would be remarkable if all of those witnesses had exact-

ly the same story, or if several people viewing a person gave exactly the same description.

You wouldn't expect it. If all 12 of you were asked to estimate the height of anybody in this room, you know there would be a considerable discrepancy in both height and weight.

So you can't expect people to be exact, and where there is some slight discrepancy, you are not going to say, "Well, such and such a person is lying about it." That isn't the question at all.

Counsel brought out that, I believe it was, Wong had said at the preliminary he thought it was a flowered-type pattern.

When I showed him the shirt, he said, "Well, that is what I mean".

Well, as you know, he is a Chinese, and he just said, "That is what I mean, it looks like the shirt that he had on."

I don't think there is any real discrepancy there at all.

[fol. 589] Now, counsel has tried through his argument here to make out that somehow or other these witnesses were coached in some way or another to identify the defendant.

But let's look at the facts of the situation.

You had, actually, I believe there were, six witnesses who identified the defendant at three different robberies; that is, one attempted robbery and two actual robberies.

There were two persons on the first robbery, rather, attempted robbery, three on the second one, the Three Point Liquors, and one at the Linden Liquors.

They have all come in here, and they haven't said, "I think that is the man." They have all said, "That is the man."

Now, as to the manner in which the identification was made, that is, the identification the next day, I think that is important.

Before the various witnesses went to the lineup the following day, there is no evidence that they were shown any picture. In fact, they have testified they weren't shown anything.

The following day, one day after the robberies and attempted robbery, they go down to the lineup.

There is ome five men in the lineup. They all go up and view the persons in the lineup, and they all identify the defendant.

Now, Mr. Banks brings out that some time later after they have identified the defendant, some time later, he says, "Well, the witnesses all say that they were shown [fol. 590] a picture," and he goes to great lengths in trying to make out there is something very bad about that.

Well, I would simply say this to you, that any attorney who has a case to try will certainly—you will naturally expect him to talk to his witnesses.

In fact, I don't think the defendant is going to disagree with that.

You are not going to take a witness out of thin air and just call him in to the witness stand. You want to talk to him first. It is just a normal procedure.

Now, counsel said in regard to, I think, Perry, that at the lineup he was positive as to the coat and hat, and now he says, "Well, it looks like the coat and hat."

THE DEFENDANT: Well—

MR. MURPHY: Well, that, I suggest to you, is not the testimony at all.

At the lineup he said he was positive of the identification of the defendant, and here he is positive as to the identification of the defendant, but as to the coat and hat, he says, "It looks like the coat and hat."

Well, certainly, you are not going to expect a witness at the time the robbery is committed to go down and put some kind of a mark on the clothing so he can positively identify that clothing.

The best any witness is going to be able to do is say, "It looks like the clothing."

[fol. 591] Unless somebody actually marks it like the police do in some cases, put their serial number on a particular item of evidence, but if you don't do that, you can't positively state that is the particular item.

Now, counsel, or Mr. Banks, has brought out that some of the police reports did not, for example, have

a mustache on them as part of the description, or, perhaps, didn't have a scar.

Well, that is an extremely immaterial point, simply because there is no evidence that the officer asked him, "Did the man have a scar," or, "Did the man have a mustache".

And even one of the officers, I recall, testified when asked, "Did the witness tell you that the man had a mustache," he said, "I don't remember."

So the fact that a complete, detailed, minute description does not appear on a police report does not mean that the witness didn't see what he says he saw. It doesn't mean that at all.

The defendant says in regard to the Linden Liquor robbery that Pauletich's mother was there, and why wasn't she called.

Well, the defendant knew all about Mrs. Pauletich, and if he had wanted her to testify in this case, have her brought in here, he could easily have done so.

Now, then, counsel says, "Why do these witnesses lie about the statements they made. They say here, 'It looks like the man' ".

Well, that isn't the testimony at all. As you well re- [fol. 592] call, I am sure, the witnesses didn't say, "It looks like the man," they said, "That is the man."

Now, I might point out some other things about the way that lineup was conducted which appear in evidence.

There is testimony in the evidence that the officer told the witnesses not to talk when they came up to the place where they view the witnesses or the persons in the lineup one by one.

Each of the witnesses was carefully examined by the defendant on the point of whether one of the witnesses had told, had said anything about who the robber, who the person in the lineup was that they identified.

Each one of them said that they made the identification themselves, there was no—

There isn't a particle of evidence that there was any encouragement of one witness by another in making the identification. It is all in the evidence, it was done independently by each one of them.

Now, counsel has made a statement which I think is rather remarkable.

He says that there is no evidence in this case to show that he was the robber.

And, as I say, I think that is rather remarkable where you have six witnesses who have identified the defendant as being the person who committed the various robberies.

Several of the witnesses, Wong, Jow, Perry and Grif- [fol. 593] fith all recall seeing a scar on the left side of his face.

Jones didn't see that because he said the man—he saw the right side of the person's face as he was almost backed into by the robber in the situation that he was involved.

The witnesses have also said that the clothing that the man was wearing at the time looks like the clothing that was shown to them here in the courtroom.

In addition to the eyewitness identification—which I might point out to you is direct evidence in this case.

In addition to that, there is a considerable amount of circumstantial evidence in this case, also.

I am sure some of you know the difference. You will be instructed by the Court as to the two kinds of evidence in a particular criminal case; direct evidence, indirect, or circumstantial evidence.

Direct evidence is the evidence of a person's senses, something that he experiences with his own physical senses.

A person testifies that somebody did a particular act that is an issue in the case. That is direct evidence of that act.

Circumstantial or indirect evidence can either be a presumption or inference. An inference being simply a deduction which the reason of the jury draws from facts which have been proved.

In some cases circumstantial evidence is typical.

For example, in a burglary where, typically, a person [fol. 594] isn't seen at the time, but you might find tool markings where he made the point of entry, and maybe he has tools found in his possession which match up

with the tool markings, that would be circumstantial evidence.

Or he might be found in possession of something stolen in the particular burglary, which would be circumstantial evidence.

Well, there is some circumstantial evidence in this case, also, which I would like to particularly point out.

For one thing, the manner of the person committing these offenses. Two of the witnesses described him as being very cool.

In fact, Perry said, I think he said, "cool, just like you are right now."

Pauletich described him as being very calm.

I am sure from your own observation of the defendant you know that he is cool, as Perry said, "cool, like you are right not."

Another point is the maner in which these offenses were committed. You might call it the "M.O." the modus operandi.

In each one of these three offenses that the defendant is charged with, he had his right hand in his coat pocket simulating the gun.

That tends to show that the same person—with three different offenses committed in the same way—tends to show the same person committed those three offenses.

If you had a case, for example, where you are satis- [fol. 595] fied that one identification of the person is good identification, the other identification may not be very good, but you are satisfied that each of the offenses were committed in exactly the same way, you could reasonably make an inference that the same person, if you are satisfied committed one of the offenses, committed the other ones, too.

Well, anyway, that kind of evidence is also circumstantial evidence.

Another type of circumstantial evidence in this case is the accusatory statement.

The accusatory statement being a situation where a person is accused of an offense and he fails to immediately deny that he has anything to do with the offense.

And the inference then is that because he didn't deny it, that is a form of admission of guilt.

In this particular case, there are two instances of that kind.

You recall Perry testified as to one of them, that right after the lineup he confronted the defendant, said right in the immediate presence, about three feet or so away, of the defendant to Inspector Zweigle, "That is the man who robbed me."

And the defendant would not reply, did not deny it.

Another instance of accusatory of statement is in the case of Mr. Smith.

Coatsie Smith testified that at the time of the arrest of the defendant the officer said, "You look like the sus-
[fol. 596] pect in these robberies."

And Smith testified that the defendant made no reply to that accusation.

Another kind of circumstantial evidence in this case is the money.

There is testimony by Pauletich that a considerable number of $1.00 bills were taken in the robbery of his liquor store.

The defendant had in his possession 31 $1.00 bills stuffed in different pockets. The officer specifically testified that they were crumpled up, the money in his pocket was crumpled.

Well, that is, again, a form of indirect or circumstantial evidence.

If a person is found shortly after an offense with money, similar denominations of that taken in the robbery, crumpled up in that fashion, that is some circumstantial evidence of the offense.

Now, also, the defendant here, as you know, has failed to testify in his own defense.

I think you will be instructed on that point that where there is evidence in the case that the defendant can reasonably be expected to deny or explain because of the facts within his knowledge, and he does not testify, the jury can consider that failure as tending to indicate the truth of such evidence, and as indicating that among the various inferences that you could draw from the evidence, those inferences unfavorable to the defendant are the most probable.

[fol. 597] And you have that situation here.

Now, as to this money that the defendant says, or the witnesses say that he earned, there is no evidence in the case that the defendant had that much money in his possession at the time he was arrested, not a particle of evidence of that.

Actually, if you look at the denominations of the money that the witnesses says he earned:

Princess Nance said that she gave him a $100.00 bill and two twenties; Cunningham, six $1.00 bills, apparently, three dollars twice; Pollard, a twenty and four fives, and O'Hara, a $10.00 bill and two ones, making a total of eight $1.00 bills.

So there isn't a particle of evidence in this case that the same money that the defendant earned was the same money that he had in his possession.

Actually, this happened right around the first of the month, and we don't know exactly what the defendant's circumstances are because he hasn't testified before you.

It is common knowledge that most people have bills to pay. This happens.

He received this $100.00 from Mrs. Princess Nance around the 30th, I believe, of April.

In fact, all these payments were right around the first of the month, between the 30th, rather, from the 28th to the 30th of April.

[fol. 598] We don't know but what he had various bills to pay which he might have paid with that money.

He says why should he have to rob. Well, that is a question you could ask of many persons who commit robberies, who might very well be employed but still commit them.

Well, ladies and gentlemen, that is the substance of the evidence in this case.

I think you will be instructed on proof beyond a reasonable doubt, but that does not mean proof to the exclusion of any possible doubt.

It doesn't mean you have to prove a case to any mathematical certainty, because that is obviously impossible.

The evidence has to convince the minds of the jurors, satisfy their conscience, that the defendant is guilty of the offenses charged.

As you know, punishment in any case is for the Court alone and should not be discussed by the jury.

At any rate, I ask you when you consider this case to consider all the evidence very carefully, and I don't think you should consider any particular piece of evidence in an isolated fashion, but you should consider all of the evidence together.

And I know that when you do so in this case that you will bring in a proper verdict.

Thank you.

THE COURT: Ladies and gentlemen of the jury, I [fol. 599] will instruct you now before lunch; otherwise, it will be 2:00 o'clock by the time you get back and about 2:30 before your deliberations.

So we probably can save some time for you and get you on the job a little earlier.

Does anybody feel a need of a recess now?

(No response.)

THE COURT: All right, we will go ahead then and start in.

INSTRUCTIONS GIVEN TO THE JURY BY THE COURT

THE COURT: Ladies and gentlemen of the jury:

It now becomes my duty to instruct you as to the law governing your deliberations in this case.

Upon all questions of law it is your duty to be guided by the instructions of the Court and to accept the law as given to you by the court; but you are the sole and exclusive judges of all questions of fact, and of the weight and effect of the evidence, and of the credibility of witnesses.

Your power of judging of the effect of evidence, however, is not arbitrary, but is to be exercised with sincere judgment, sound discretion, and in accordance with the rules of law given to you by the Court.

The statements and arguments of counsel are not evidence in the case, and any statements made by counsel either during the trial or argument which are not sup- [fol. 600] ported by the evidence or which are inconsistent with the instructions as to the law are to be disregarded by you.

This, however, does not apply to stipulations of fact, which stipulations of fact must be treated by you as proven facts in the case.

From these instructions given by the Court, from the rulings made by the Court in your presence, from the questions asked of witnesses by the Court and from anything that has occurred in the trial, you are not to infer what the opinion of the Court may be as to the guilt or innocence of the accused. The question of guilt or innocence of the defendant is for you alone to determine.

Certain evidence has been admitted with certain limitations as to its competency and effect. You will be especially careful in weighing and considering such evidence not to consider it for any purpose except that for which it was admitted.

The defendant is on trial only for the offenses charged in the information, and you may not convict the defendant solely or only because you may believe, if you do believe, that the defendant is guilty of some other crime or public offense not charged in the information under consideration.

You have no right to speculate as to what any person not called as a witness might testify to if called, nor as to [fol. 601] what any document not admitted in evidence would disclose if admitted, nor as to what the answer would be to any question not permitted by the Court to be answered.

If in these instructions certain principles of law are repeated, the fact is of no significance. All principles of law herein given are of equal importance.

You are not to consider for any purpose any testimony or evidence that has been taken out by the Court, or the offer of any evidence which was not admitted by the Court.

The information in a criminal case is a mere accusation by the prosecution against the defendant, and neither is it, nor is the fact that the defendant has been arrested, charged with crime, and is on trial, to be considered by the jury as evidence, and the jury is not authorized in the slightest degree to infer or presume the guilt of the defendant therefrom.

Upon arraignment, the defendant entered his plea of "not guilty" to the effenses charged in each count of the information, which puts in issue every material allegation of each of the counts and places the burden upon and makes it the duty of the prosecution, before a conviction can be had, to establish to the exclusion of all reasonable doubt each and every fact essential to a conviction of the crime charged in each count of the information.

[fol. 602] Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which juries lawfully may base their findings, whether favorable to the People or to defendant, provided, howewer, that to support a verdict of guilty the evidence, whether of one kind or the other or a combination of both, must carry the convincing quality required by law as stated.

One kind of evidence is know as direct evidence and the other is circumstantial. The law makes no distinction between the two classes as to the degree of proof required for conviction or as to their effectiveness in defendant's favor, but respects each for such convincing force that it may carry and accepts each as a reasonable method of proof.

Direct evidence of a person's conduct at any time in question consists of the testimony of every witness who, with any of his own physical senses, perceived such con-

duct or any part hereof, and which testimony describes or relates what was thus perceived. All other evidence admitted in the trial is circumstantial in relation to such conduct, and, insofar as it shows any act, statement or other conduct, or any circumstances of facts, tending to prove by reasonable inference the innocence or guilt or the defendant, it may be considered by you in arriving at a verdict.

Circumstantial evidence, sometimes called indirect evidence, is of two kinds, namely, presumptions and inferences.

[fol. 603] A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved, and must be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

You are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner of the witness on the stand, the degree of intelligence exhibited by him, and the manner in which he testifies, by the character of his testimony, by evidence showing his motives and interest in the outcome of the case, or bias or prejudice against one of the parties, by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony.

A witness may be impeached by contradictory evidence, or by evidence that on some former occasion he made state-
[fol. 604] ments, or conducted himself in a manner, inconsistent with his present testimony.

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material fact, unless, from all the evidence, you shall believe that the probability of truth favors his testimony in other particulars.

If you should find from the evidence that there was an occasion when the defendant, under circumstances which fairly afforded him an opportunity to reply, failed to make denial in the face of an accusation expressed directly to him or in his presence charging him with a crime for which he is now on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstance of his silence and conduct may be considered against him as indicating an admission that the accusation thus made was true.

Evidence of such an accusatory statement is not received for the purpose of receiving the truth but only to explain
[fol. 605] the conduct of the accused in the face of it.

Unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement.

Evidence has been received in this case tending to show that on an occasion other than this trial the defendant

made a statement tending to prove his guilt of the alleged crimes for which he is now on trial.

This statement is claimed to be an admission.

An admission is something less than a confession and is but an acknowledgement by the defendant, outside of this trial, of some fact or circumstances which in itself, even if true, is not sufficient to warrant an inference of guilt but which tends to prove guilt when considered with the rest of the evidence.

If you should find that a statement voluntarily made by the defendant outside of this trial was false in any particular, it remains, nevertheless, evidence for your consideration in connection with all other evidence in the case and is to be given such significance and weight as your judgment may determine.

The law of this State admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant.

You must weigh and consider this case without regard [fol. 606] to sympathy, prejudice or bias for or against anyone involved in this case. Your verdict is to be reached upon the evidence produced upon the trial of this case, and you should not permit speculation, conjecture or sentiment to influence you one way or the other.

In order to convict in a criminal case such as the one now being tried, it is necessary for the jury to find from the evidence that the defendant is guilty of the crime charged beyond and to the exclusion of all reasonable doubt, and to a moral certainty.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal; but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows:

> "It is not a mere possible doubt, because everything related to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction, to [fol. 607] a moral certainty, of the truth of the charge."

The law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it.

The Court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are.

As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

In arriving at a verdict in this case the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the Court

and other governmental agencies and must not in any way affect your decision as to the innocence or guilt of the defendant.

Evidence was offered in this case for the purpose of showing that the defendant committed a crime other than [fol. 608] that of which he is accused and for which he is here on trial.

Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in this action.

You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other in the case.

The value, if any, of such evidence depends on whether or not it tends to show:

(1) The identity of the person who committed the alleged crime in question in this case, if it was committed; or

(2) That there existed in the mind of the defendant a plan, scheme, system or design, into which fitted the commission of the offense for which he is now on trial; or

(3) That the defendant possessed knowledge that might have been useful in the commission of any crime for which he is now on trial.

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision.

As to any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not tes- [fol. 609] tify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the infer-

ences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

In this connection, however, it should be noted that if a defendant does not have the knowledge that would be needed to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence.

The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

In deciding whether or not to testify, the defendant may chose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the people so as to support by itself a finding against him on any such essential element.

[fol. 610] The defendant in this case is accused of one count of attempted robbery and two counts of robbery.

So that the charging portions of the information will be fresh in your mind, I will read them to you at this time. The first count reads:

> "In that on or about the 4th day of May, 1962, in the County of Alameda, State of California, the defendant attempted to rob Roger Wong of lawful money of the United States."

The second count reads:

> "In that on or about the 4th day of May, 1962, in the County of Alameda, State of California, the de-

fendant robbed Robert Perry of $70.00, more or less, lawful money of the United States."

And the third count reads:

"In that on about the 4th day of May, 1962, in the County of Alameda, State of California, the defendant robbed William Pauletich of $175.00, more or less, lawful money of the United States."

Robbery is defined as follows:

"Robbery is the felonious taking of personal property of any value in the possession of another from his person or immediate presence and against his will accomplished by means of force or fear. The specific intent to steal property from the possession of another by means of force or fear and with the intent [fol. 611] of permanently depriving the owner of his property are necessarily elements of this crime."

Robbery which is perpetrated by torture or by a person being armed with a dangerous weapon is robbery in the first degree. All other kinds of robbery are of the second degree. If you should find the defendant guilty of robbery, it will be your duty to determine the degree thereof, and to state that degree in your verdict.

A dangerous or deadly weapon, as the terms is used in the law just stated to you, means any weapon, instrument or object that is capable of being used to inflict great bodily injury and that is carried by a person with the intention of using the same as a weapon of offense or defense in the event circumstances should appear to him to require that he do so.

To constitute a robbery as being one of the first degree because the person committing it is armed with a dangerous or deadly weapon, it is not necessary that such weapon be used; and the degree of the crime is the same whether or not the weapon is concealed from view.

An attempt is defined as follows:

"An attempt to commit a crime consists of two elements, namely, specific intent to commit the crime and a direct but ineffectual act done towards its com-
[fol. 612] mission."

In determining whether or not such an act was done, it is necessary to distinguish between mere preparing on the one hand and the actual commencement of the doing of the criminal deed on the other.

Mere preparing, which may consist of planning of the offense or of devising, obtaining or arranging the means for its commission is not sufficient to constitute an attempt.

But acts of a person who intends to commit a crime will constitute an attempt where they themselves clearly indicate a certain unambiguous attempt to commit such specific crime, and in themselves are an immediate step in the pre-execution of the criminal design, the progress of which would be completed unless interrupted by some circumstances not intended in the original design.

When a person has once committed acts which constitute an attempt to commit a crime, he cannot avoid responsibility by not proceeding further with his intent to commit the crime either by reason of voluntarily abandoning his purpose or because of a fact which prevented or interfered with his completing the crime.

If you find the defendant guilty of the offense charged, but have a reasonable doubt as to whether it is first or second degree, it would be your duty to find him guilty of that crime in the second degree.

[fol. 613] Each count set forth in the information charges a separate and distinct offense. You must consider the evidence applicable to each allege offense as though it were the only accusation before you for consideration, and you must find as to each count in a separate verdict uninfluenced by the mere fact that your verdict as to the other counts is in favor or against the defendant.

He may be convicted or acquitted upon any or all of the offenses charged depending upon the evidence and the weight you give to it under the Court's instructions.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you.

For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

Your verdict must be unanimous on the question of the guilt or innocence of the defendant on each count. If from the evidence you find the defendant guilty, your verdict must be unanimous as to the degree of the crime in each count.

Upon retiring to the jury room, you will select one of your fellow jurors to act as foreman, who will preside [fol. 614] over your deliberations and who will sign the verdict to which you agree. In order to return a verdict it is necessary that all 12 of the jurors agree to the decision. As soon as all of you have agreed upon a verdict on each count, you shall have them signed by your foreman and return with them to this room.

Nine forms of verdict have been prepared for your convenience. Omitting the title of court and cause, I will read the three forms on the first count. The others are similar.

The order in which the forms are read is of no significance.

"We, the jury in the above-entitled cause, find the defendant, Fred Banks, guilty of felony, to wit, attempted robbery, as charged in the first count of the information, and we further find that the attempted robbery is of the first degree."

The next form reading:

"We, the jury in the above-entitled cause, find the defendant, Fred Banks, guilty of felony, to wit, attempted robbery, as charged in the first count of the information, and we further find that the attempted robbery is of the second degree."

The next form reading:

"We, the jury in the above-entitled cause, find the defendant, Fred Banks, not guilty of felony, to wit, attempted robbery, as charged in the first count of [fol. 615] the information."

The remaining six would apply to the second and third counts.

All right, the Clerk will swear the Bailiff to take charge of the jury.

(The Bailiff was duly sworn by the Clerk.)

All right, ladies and gentlemen of the jury, you are now in the charge of the Bailiff. If you desire to contact the Court during your deliberations, you will do so through him.

When you have finished your deliberations, you will notify the Bailiff and he will escort you back into the courtroom where your verdicts will be announced.

All right, fine.

(Whereupon, at 11:50 o'clock a.m. the jury retired from the courtroom to deliberate the verdicts.)

* * * *

[fol. 619] PROCEEDINGS IN OPEN COURT
3:00 P.M.

THE COURT: All right, stipulated the jury is all present.

I have your note:

> "Does robbery in the first degree necessitate the actual possession of a weapon, or does the mere fact that a weapon is simulated enough to constitute robbery in the first degree?"

The instructions provide, and I will just read that one paragraph, and perhaps that will answer the question:

> "To constitute a robbery as being one of the first degree because the person committing it is armed with a dangerous or deadly weapon, it is not necessary that such weapon be used; and the degree of the crime is the same whether or not the weapon is concealed from view."

However, there must be a weapon, so whether or not the weapon was concealed from view would not be the controlling point. The controlling point would be whether the jury finds there was a weapon in the pocket.

Does that answer your question?

FOREMAN OF THE JURY: Yes, sir.

THE COURT: All right, fine.

> (Whereupon, at 3:01 p.m. the jury retired from the courtroom for further deliberations.)

[fol. 620] PROCEEDINGS IN OPEN COURT
3:15 P.M.

THE COURT: Stipulated the jury is all present.

Ladies and gentlemen of the jury, have you reached a verdict?

FOREMAN OF THE JURY: We have, your Honor.

THE COURT: All right, Mr. Saunders, will you hand the verdict to the Bailiff, please.

All right, the Clerk will read the verdict.

* * * *

November 13, 1962

Mr. Robert Chefsky
Attorney at Law
1330 Broadway
Oakland 12, California

Re: 1/Crim. 4261—People v. Banks
Appellant's Opening Brief Due December 13, 1962.

Dear Sir:

Enclosed herewith is a copy of an order of the court appointing you to represent the appellant in the above entitled proceeding. His name and address are as follows:

Fred Banks
Box A-73884
Represa, California

The appellant has been furnished with a copy of his record on appeal and he should make it available to you for your use in preparing the briefs on appeal.

The appellant's opening brief is due on the date indicated above. Should you require additional time for the preparation of the opening brief, application therefor may be made by affidavit setting forth the reasons for the request and praying for such additional time, not to exceed 30 days. Further requests may be made in a similar manner if even more time is needed.

Please do not hesitate to call upon us if we can be of any further assistance to you.

Very truly yours,

LAWRENCE R. ELKINGTON,
Clerk

By
Deputy

LRE:ao
Encl.

cc: Attorney General
Appellant

OFFICE OF THE CLERK

DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
Lawrence R. Elkington, Clerk

[SEAL]

Division One
Division Two

Deputies

G. E. Bishel
F. M. Thompson

San Francisco 2
4154 State Building
Civic Center
UN 1-8700

August 13, 1963

Robert M. Chefsky
Attorney at Law
Suite 1043
1330 Broadway
Oakland 12, California

Re: 1/Crim. 4621, People v. Banks

Dear Sir:

Enclosed herewith is a copy of a letter which we received today from the appellant, Fred Banks.

You were appointed by this court to represent Mr. Banks on November 13, 1962. You have not filed a brief on his behalf, and your last extension of time for filing such a brief expired on March 21, 1963. The court requests that you advise us promptly what you intend to do about this case.

Very truly yours,

Clerk

LRE:lle
enc

10-25-63 Talked to Mr. Chefsky. He will get right to work on the brief. LRE

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

1 Crim. No. 4261

Filed, Dist. Court of Appeal—First Dist., Sep 16, 1964,

Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

v.

FRED BANKS, DEFENDANT AND APPELLANT

Defendant Fred Banks appeals from a judgment convicting him of one count of attempted robbery in the second degree, and two counts of robbery in the second degree, with three prior felony convictions.

Defendant was identified by several customers and the owners of four liquor stores located in Oakland as the person who, while simulating a gun in his righthand coat pocket, robbed two of the stores of $100 and $165 respectively, was repulsed in another, and, after certain equivocal conversation in the last, was arrested on suspicion because he fitted the description relayed to the officers of the person who had engaged in the robberies. Upon search, $176 in currency was found on defendant. Upon questioning as to what he had done with the gun, defendant replied, "I didn't have a gun. If I had one, I would probably have killed somebody tonight. Guns make me very nervous."

Appellant did not testify on his own behalf, but produced four witnesses who stated that they had employed appellant shortly before the robberies and had paid him sums of money totaling $150 to $200.

Appellant first contends that the court committed prejudicial error and deprived him of due process of law by denying his motion for a separate trial on each of the

three counts charged in the information. This argument is without merit.

The record reveals that all three counts of the information charged appellant with crimes within the same class. Penal Code, section 954, provides in relevant part that "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts. . . . [T]he defendant may be convicted of any number of the offenses charged . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately. . . ."

The courts have held that the phrase, "the same class of crimes or offenses," was intended by the Legislature to mean offenses possessing common characteristics or attributes. (People v. Thorn (1934) 138 Cal.App. 714, 734-735; People v. Duane (1942) 21 Cal.2d 71, 77-78; People v. Kemp (1961) 55 Cal.2d 458, 475-476.)

It requires no exposition by us to establish that robbery and attempted robbery belong to the same class of crimes and that both are motivated by the intent to feloniously obtain property.

Although appellant makes some attempt to argue that section 954 is in violation of the Fourteenth Amendment of the federal Constitution because it deprives a defendant of the right to a separate jury trial on ach offense charged, this argument has been rejected by the California courts. (See In re Pearson (1947) 30 Cal.2d 871, 873.)

Appellant next contends that the court erred in allowing him to waive his right to counsel, and conduct his own defense. We do not agree.

The record discloses that appellant was represented by the public defender at the preliminary examination and arraignment; that at the setting of the trial date, appellant requested that the court appoint and pay for counsel other than the public defender, which the court informed appellant it could not do, whereupon appellant stated that he would prefer to represent himself. Subsequently the

cause came on for trial and appellant again stated that he would prefer to act as his own counsel if the court could not appoint an attorney other than the public defender to represent him. Although the court spent considerable time attempting to persuade appellant to accept the services of the public defender, appellant refused to do so. The court then asked appellant a number of questions, the answers to which disclosed that appellant was 48 years of age, that he had a sixth grade education, that he had spent 22 years in prison, and that he had previously received psychiatric treatment of an unspecified nature. At the conclusion of this examination, the trial judge stated that his discussion with appellant had convinced him that appellant was "a person of intellect" despite his limited education, that he had evidently had considerable contact with people, that he spoke well, and that he had unquestionably acquired experience in relation to court matters, and permitted him to represent himself. Appellant observed that he was still insistent upon acting as his own counsel, because in the event he were convicted, it "looks much better" on appeal. Although appellant stated that he desired no assistance whatever from the public defender, the court ordered the public defender to be present throughout the trial in order that appellant could obtain his advice and counsel whenever necessary.

Appellant conducted his defense in an able manner and, at the conclusion of the trial, the court commented that appellant had done an "excellent job," which was "about as good as the average young attorney does on his first few cases."

The question of waiver of counsel is largely a matter for the determination of the trial judge, and his decision will not be disturbed on appeal in the absence of an abuse of discretion. (People v. O'Ward (1959) 168 Cal.App.2d 127, 131.) We find no abuse of discretion here.

Appellant next contends that the court deprived him of due process by allowing him only ten peremptory challenges during the voir dire examination of the jury. Appellant asserts that he ought to have been allowed 20 because robbery is a crime punishable by an indeterminate sentence of "not less than one year" (Pen. Code, § 213),

and because Penal Code, section 1070, provides in relevant part that "If the offense charged be punishable . . . . with imprisonment in the state prison for life, the defendant is entitled to twenty . . . peremptory challenges." Appellant further asserts that since the information charged him with three prior felony convictions, he was also subject to life imprisonment as a habitual criminal under Penal Code, section 644.

Appellant's contention that the crime of robbery is punishable by life imprisonment within the meaning of Penal Code, section 1070, is thoroughly lacking in merit and has been rejected by the California courts. (People v. Clough (1881) 59 Cal. 438, 441-442; People v. Riley (1884) 65 Cal. 107, 108-109; People v. Sullivan (1901) 132 Cal. 93; People v. Purio (1920) 49 Cal.App. 685, 687.)

Appellant's contention that he was punishable by life imprisonment as a habitual criminal is similarly untenable. A reading of the information reveals that appellant was charged in three separate counts with having been previously convicted of the felonies of murder, robbery, and armed robbery. All three convictions occurred on July 20, 1936, in the Circuit Court of the State of Illinois, in and for the County of Cook. It was further alleged that pursuant to all three convictions, appellant served a term in the Illinois State Prison at Joliet.

Pursuant to subdivisions (a) and (b) of Penal Code, section 644, a defendant may be adjudged a habitual criminal only if he is convicted in this state of certain designated crimes (of which robbery is one) and shall have previously been twice or three times convicted "upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison . . . either in this State or elsewhere" of certain designated crimes (which include murder and robbery). The express limitations of the section clearly preclude appellant from its operation since the information shows that the three prior convictions were not upon charges separately brought and tried.

Appellant next asserts that the court erred in sentencing him to state prison "for the term provided by law" because, according to appellant, the maximum sentence

for second degree robbery is one year, and the judgment ought to have so provided. This argument is completely inconsistent with appellant's prior contention that second degree robbery was punishable by life imprisonment. In any event, Penal Code, section 213, expressly provides that robbery in the second degree is punishable by imprisonment in the state prison "for not *less* than one year" (emphasis added).

Appellant next contends that the court improperly refused to dismiss the action pursuant to Penal Code, section 1382, for the prosecution's failure to bring appellant to trial within 60 days after the filing of the information. The record lends no support to this contention since the information was filed on May 31, 1962, and the trial began 60 days thereafter, on July 30, 1962.

Appellant has enumerated some 11 separate assignments of error or misconduct, the cumulative effect of which allegedly deprived him of a fair trial. Appellant first asserts that several comments by the trial judge were indicative of his bias against appellant. This contention is totally devoid of merit, since the record shows that the trial was conducted in a scrupulously fair and impartial manner throughout.

Appellant also contends that the court erred in refusing to provide, at county expense, an expert witness who could testify to the fallibility of eyewitness identifications and in refusing to grant a continuance for this purpose. This contention is frivolous. The credibility of the various witnesses who identified appellant was a question for the jury and there is no need for expert opinion.

Appellant also asserts that the court erred in failing to exclude as irrelevant the testimony of witnesses Slaise and Smith. Suffice it to say that the record does not support this contention and the court's ruling was correct.

Appellant next asserts that the court erred in instructing the jury on admissions by silence since, according to appellant, he might well have failed to deny the police officer's statement out of fear of his authority or out of ignorance of the robberies. This argument is wholly without merit. (People v. Davis (1957) 48 Cal.2d 241, 249-251.)

Appellant next contends that his arrest was illegal and that it was therefore error to admit into evidence the clothing which he was wearing at the time of his arrest. The arrest was legal. (Pen. Code, § 836, subd. 3.)

Appellant's contentions that the prosecutor was guilty of misconduct and that the court improperly disallowed appellant's challenges for cause are without support in the record.

There is similarly no merit to the assertion that the court improperly refused certain of appellant's proposed instructions. All but two of these instructions were covered elsewhere in the court's charge, and the others were appropriate only to a case based substantially or entirely upon circumstantial evidence.

Judgment affirmed.

/s/ Shoemaker,
SHOEMAKER, P. J.

WE CONCUR:

/s/ Agee
AGEE, J.

/s/ Taylor
TAYLOR, J.

Certification of Nonpublication

This opinion does not require publication in the advance sheets or official reports, under the standards provided by Rule 976, California Rules of Court.

/s/ Shoemaker
SHOEMAKER, P. J.

/s/ Agee
AGEE, J.

/s/ Taylor
TAYLOR, J.

ROBERT M. CHEFSKY
Attorney At Law

Telephones:
444-2931
444-4292

Suite 1043
First Western Building
1330 Broadway
Oakland, California 94612

September 17, 1964

Mr. Fred Banks
Box No. A-73884
Represa, California

Re: People vs. Banks

Dear Mr. Banks:

Concerning the above case, I enclose a copy of the opinion of the District Court of Appeal affirming the judgment previously entered against you. If it is any consolation, the only result that could have been obtained other than this would be to obtain a new trial at which any errors that you feel were committed below would have been corrected by the Court and in my opinion the evidence would have been sufficient to obtain another conviction.

In my opinion there is no further justification to continue with any further appeal. Although you may still be too close to this case to appreciate it, the large number of points which were raised in your behalf in this appeal were raised primarily because you had requested them to be included. They were not, in my opinion, error in the legal sense.

So far as the records indicates, you appear to have received a fair and impartial trial.

I am returning the transcript of your earlier trial under separate cover. I can only hope that by serving your time for these charges and maintaining a good record you will emerge in time into private live, a wiser man.

I therefore take this occasion to end my efforts in this matter and close my file.

Sincerely,

ROBERT M. CHEFSKY

RMC/smr
Enclosures

DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION TWO

Crim. No. 4261

Filed, Dist. Court of Appeal—First Dist., Nov 18, 1964,
Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

FRED BANKS, DEFENDANT AND APPELLANT

BY THE COURT:

Pursuant to the provisions of Section 1241 of the Penal Code, the fee of Robert M. Chefsky as court appointed counsel is fixed at the sum of $95.00 (Illegible).

Dated November 18, 1964

/s/ Shoemaker, P. J.

DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

DIVISION TWO

Crim. No. 4261

Filed, Dist. Court of Appeal—First Dist., Mar 1, 1966, Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

FRED BANKS, DEFENDANT AND APPELLANT

BY THE COURT:

A mandate of the United States Supreme Court having been received and filed, it is ordered that said mandate be spread in full upon the minutes of this court.

Acting pursuant to the directions contained in the mandate, the remittitur issued on November 16, 1964 is recalled, the judgment of this court dated September 16, 1964 is vacated, and the cause is submitted for decision.

Dated March 1, 1966

/s/ Shoemaker, P. J.

OFFICE OF THE CLERK
DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

Lawrence R. Elkington, Clerk

[SEAL]

Division One
Division Two
Division Three

—

San Francisco 94102
4154 State Building
Civic Center
557-1896

Deputies

—

F. M. Thompson
T. D. Bowman
R. F. Lippi

March 4, 1966

Mr. Fred Banks
Box A-73884
Represa, California 95671

Re: 1/Crim. 4261—People v. Banks

Dear Sir:

The United States Supreme Court has vacated the judgment of this court in the above entitled case and has remanded the case to us for further proceedings in the light of Griffin v. California, 380 U. S. 609.

This court wishes to know whether it is your desire to submit anything further to the court by way of written argument before we proceed to decide the case pursuant to the directions of the United States Supreme Court.

Very truly yours,

LRE:ao

Clerk

cc: Mr. Robert M. Chefsky
Attorney at Law
1043 First Western Bldg.
Oakland 12, California

Office of the
Attorney General

Name Fred Banks
Box No. A-73884, Represa, Calif.

Date March 9, 1966

District Court of Appeal
State of California
First Appellate District
State Building, Civic Center
San Francisco, California 94102

RE: 1/Crim. 4261—People v. Banks

Greeting:

The Defendant-Appellant moves this Court for Sixty Days continue to filed a brief and argument in the about—entitled cause.

The Defendant-appellant further moves this Court:

1.) To assign Counsel to aid in preparing a brief to this Court, since the Counsel appointed on the original appeal could not see any Constitutional errors, he could only see procedure errors. It would be almost impossible for him to see any Constitutional errors at this later stage.

2.) The Honorable Justices that decided the original appeal could not fine any merits in the case. When more then 21 Constitutional errors were in the case. It is Defendant-appellant request that the aforesaid Honorable Justice disqualified themselves, because they have prejudged the case and it is impossible for them to follow the directions of the United States Supreme Court Mandate and follow the direction set out in the Griffin v. California, 380 U. S. 609. It would in it's self be a violation of the Constitution for them not to reversed the case.

3.) Defendant-appellant moves this Court to allow him to appear and argue his case before this Honorable Tribunal, and in conpliance with Penal Code Section 1253, to avoid such procedure error "as judgment may be affirmed, but not reversed without argument." Under the rules of Price v. Johnson, 334 U. S. 266, 280. If this Honorable Court

fail to appoint Counsel other then the Counsel original appointed, the Defendant-appellant moves that he be personal presence and to participate in the oral argument.

THEREFORE, Defendant-appellant prays that the Court will grant the above aforesaid causes and request.

Respectfully submitted,

_____

Defendant-appellant

OFFICE OF THE CLERK
DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

Lawrence R. Elkington, Clerk

[SEAL]

Division One
Division Two
Division Three

—

San Francisco 94102
4154 State Building
Civic Center
557-1896

Deputies

—

F. M. Thompson
T. D. Bowman
R. F. Lippi

March 15, 1966

Mr. Fred Banks
Box A-73884
Represa, California

RE: 1/Crim. 4261—People v. Banks

Dear Sir:

This will acknowledge receipt of your letter of March 9, 1966.

The court has directed us to advise you that you are still represented by Mr. Robert M. Chefsky on this appeal

and that no different attorney will be appointed to represent you at this stage of the proceeding.

The case of Griffin v. California changed the law in the State of California and the Griffin case was decided after your judgment of conviction had been affirmed by this court. Mr. Chefsky could not have anticipated the Supreme Court's decision in Griffin v. California.

This court is fully familiar with the views of the United States Supreme Court in Griffin v. California and will take that case into consideration in deciding your appeal. If either you or Mr. Chefsky wishes to submit some further written argument to this court, you may do so. Any such argument should be submitted promptly.

Very truly yours,

Clerk

LRE:ao

cc: Mr. Robert M. Chefsky
Attorney at Law
1043 First Western Bldg.
Oakland, Calif.

Office of the
Attorney General

Thomas C. Lynch
Attorney General

STATE OF CALIFORNIA

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
State Building, San Francisco 94102

May 12, 1966

Filed, Dist. Court of Appeal—First Dist., May 13, 1966, Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

Mr. Lawrence R. Elkington, Clerk
District Court of Appeal
State of California
State Building
San Francisco, California 94102

Re: People v. Fred Banks
1/Crim. No. 4261

Dear Mr. Elkington:

The above entitled matter is before the Court for consideration in light of *Griffin* v. *California*, 380 U.S. 609 (1965), *rehear. den.* 381 U.S. 957 (1965). The issue, according to *People* v. *Hillery*, 62 Cal.2d 692 (1965), is whether the comment by the prosecutor and the trial court's instructions regarding appellant's failure to take the stand would result in a miscarriage of justice if the decision were not reversed. Cal. Const. Art. VI § 4 1/2.

Rarely does a case present such an overwhelming factual basis in favor of conviction. There were no highly circumstantial events surrounding these crimes about which the prosecutor asked the jury to speculate because of appellant's failure to take the stand. Banks committed a series of robberies within the matter of an hour, without a mask or other disguise, and using the same *modus oper-*

andi in each. No less than seven eye witnesses positively identified him as the perpetrator at his trial. Considerable physical evidence taken from him after his arrest and detention was also introduced against him.

In summary, the evidence against Banks was direct eye witness testimony that he was the robber. Five of those witnesses testified that they saw Banks hold up one of three liquor stores while simulating a gun in his coat pocket. The only inference left for the jury to draw due to appellant's failure to take the stand was that he had no explanation for his behavior. There was absolutely no doubt that appellant committed the acts of which he was convicted.

Moreover, appellant has failed to make any argument factually to support his contention that the then-constitutional instruction and comment would work a miscarriage if not reversed. This Court, of course, will not presume error in the absence of specific reference to factual support in the record.

Very truly yours,

THOMAS C. LYNCH
Attorney General

/s/ Charles W. Rumph
CHARLES W. RUMPH
Deputy Attorney General

CWR:EB

CC—Mr. Fred Banks
Box A-73884
Represa, California

CC—Mr. Robert M. Chefsky
Attorney at Law
1043 First Western Bldg.
Oakland, California

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

1 Crim. No. 4261

Filed, Dist. Court of Appeal—First Dist., May 20, 1966,
Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

v.

FRED BANKS, DEFENDANT AND APPELLANT

This case is before us for a second time. Our original decision was rendered on September 16, 1964. Appellant's petition for writ of certiorari to the United States Supreme Court was granted on January 24, 1966, at which time that court entered its order that our judgment be vacated and that the case be remanded to us for further proceedings in the light of Griffin v. California (1965) 380 U. S. 609.

Our prior opinion herein fully sets forth the facts of the cause and our reasons for rejecting the various claims of error raised at that time by appellant. Although additional briefs have been filed herein, no valid reason has been advanced to bring us to a different conclusion. Accordingly, we adopt that opinion in full as constituting, to the extent thereof, the present opinion of this court. A copy of said prior opinion is attached hereto and by reference made a part hereof, marked "Appendix 'A'."

We consider appellant's arguments regarding the applicability of the rule set forth in Griffin v. California, supra, as being equally without merit. The record herein discloses that the court instructed concerning the defendant's failure to testify [1] and that the prosecutor made passing

[1] The instruction is taken verbatim from California Jury Instructions, Criminal:

"It is a constitutional right of a defendant in a criminal trial

comment in respect thereto. Such action of court and counsel is contrary to the rule of the Griffin case.

Although it was error for the court to give the instruction quoted, and for the prosecutor to comment, the rule of article VI, section 4 1/2, California Constitution, is applicable and automatic reversal is not required. (People v. Bostick (1965) 62 Cal.2d 820, 823-827.) As we have noted, this was an eyewitness case. Defendant was seen and identified by six eyewitnesses as the perpetrator of the crimes of which he was convicted. He wore no mask or other disguise and each robbery was committed in a like manner. He produced no evidence contradictory of the eyewitnesses' testimony and only attempted to show that recent earnings could have accounted for the money found on his person.

In view of the abundant evidence of appellant's guilt, we are of the opinion that it is not reasonably probable

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that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision.

"As to any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

"In this connection, however, it should be noted that if a defendant does not have the knowledge that would be needed to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence.

"The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may chose [sic] to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element."

that a result more favorable to Banks would have been reached in the absence of the error. Such error did not constitute reversible error under the provisions of article VI, section 4 1/2, of the California Constitution, or under the tests enunciated in either People v. Watson (1956) 46 Cal.2d 818, 835, or Fahy v. Connecticut (1963) 375 U.S. 85, 86-87.

Judgment affirmed.

/s/ Shoemaker
SHOEMAKER, P. J.

WE CONCUR:

/s/ Agee
AGEE, J.

/s/ Taylor
TAYLOR, J.

Certification of Nonpublication

This opinion does not require publication in the advance sheets or official reports, under the standards provided by Rule 976, California Rules of Court.

/s/ Shoemaker
SHOEMAKER, P. J.

/s/ Agee
AGEE, J.

/s/ Taylor
TAYLOR, J.

Fred Banks
A-73884

June 21, 1967.

District Court of Appeal
State of California
First Appellate District
State Building, Civic Center
San Francisco, California 94102

RE: 1/Crim. 4261—People v. Banks

GREETING:

The Defendant-Appellant moves this Court for Thirty days continue to filed a brief and argument in the above-entitled cause.

The Defendant-appellant further moves this Court:

1.) To assign Counsel to aid in preparing a Brief to this Court, since the Counsel appointed on the original appeal and on The United States Supreme Court Mandate, Banks v. California, 87 Misc. No., January 24, 1966, he could not see nay Constitutional errors, he could only see procedure errors. It would be impossible for his to see any Constitutional errors at this later stage.

2.) The Honorable Justices that decided the original appeal and the United States Supreme Court Mandate, Misc. No. 87, could not fine any merits in the case. When more than 21 Constitutional errors were in the case. it is Defendant-appellant request that the aforesaid Honorable Justice desqualified themselves, or remove the case Federal Court of Appeal, Ninth Circuit, on a removal order, be cause thay have prejudged the case. It was impossible for the to fined any errors on appeal or to follow the directions of the United States Supreme Court Mandate, Misc. No. 87, Banks v. California, January 24, 1966. Now how could this Honorable Court follow the direction set out in The United States Supreme Court Mandate, Misc. No. 889, Banks v. California. It is it's self a Constitution violation if this court fail to reversed the case.

3.) Defendant-appellant moves this Court to allow him to appear and argue his case before this Honorable Tribunal,

and in compliance with Penal Code Section 12 53 (1253), to avoid such procedure error "as judgment may be affirmed, but not reversed without argument." Under the Rules of Price v. Johnson, 334 U. S. 266, 280. If this Honorable Court fail to appoint Counsel other then the Counsel of origina-l appointed, the Defendant-appellant moves that he be personal presence and to participate in the oral argument.

THEREFORE, Defendant-appellant prays that the Court will grant the above aforesaid cause and request.

Respectfully submitted,

/s/ Fred Banks
Defendant-appellant

OFFICE OF THE CLERK
DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

Lawrence R. Elkington, Clerk

Division One

[SEAL]

Division Two
Division Three

Deputies

F. M. Thompson
T. D. Bowman
R. F. Lippi

San Francisco 94102
4154 State Building
Civic Center
557-1896

June 27, 1967

Mr. Fred Banks
Box A-73884
Represa, California 95671

Re: 1/Crim. 4261, People v. Banks

Dear Sir:

Enclosed herewith is a copy of an order of this court vacating the submission of the above entitled case and granting you 30 days within which to file a supplemental brief. The order also denies your motion to disqualify the justices of Division Two and denies your motion for permission to appear in person to argue the case.

Inasmuch as this case has been restored to our list of active cases by the order of the United States Supreme Court which vacated our decision, Mr. Robert Chefsky continues to represent you and no other attorney will be appointed in his place. If Mr. Chefsky desires to file a further brief on your behalf, he will be permitted to do so.

Very truly yours,

Clerk

LRE:ym

cc: Hon. Thomas C. Lynch
Mr. Robert Chefsky

OFFICE OF THE CLERK
DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

Lawrence R. Elkington, Clerk

[SEAL]

Division One
Division Two
Division Three

Deputies

F. M. Thompson
T. D. Bowman
R. F. Lippi

San Francisco 94102
4154 State Building
Civic Center
557-1896

July 19, 1967

Mr. Fred Banks
Box A-73884
Represa, California 95671

Re: 1/Crim. 4261, People v. Banks

Dear Sir:

Your supplemental appellant's brief has been received and filed. We have also received from you another motion for the appointment of counsel, or, in the alternative, to allow you to appear in person to argue your case.

As we advised you on June 27, 1967, Mr. Robert Chefsky is still your counsel in this case pursuant to his previous appointment by this court. Under the circumstances, no other attorney will be appointed to represent you and no order will be made allowing you to come from prison to personally argue your case.

Very truly yours,

Clerk

LRE:ym

cc: Hon. Thomas C. Lynch
Mr. Robert Chefsky

Thomas C. Lynch
Attorney General

STATE OF CALIFORNIA

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

State Building, San Francisco 94102

July 26, 1967

Filed, Jul 27, 1967, Court of Appeal—First App. Dist., Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

Honorable Lawrence R. Elkington
Clerk, Court of Appeal
First Appellate District
State Building
San Francisco, California

Re: 1/Crim. 4261, People v. Banks

Dear Mr. Elkington:

In reply to your letter of July 19, 1967, inquiring whether we desire to file a brief in the above-entitled matter on remand, we feel that our previous briefs and letters in this matter adequately state the position of the People of the State of California.

If we may be of further assistance, please do not hesitate to call upon us.

Very truly yours,

THOMAS C. LYNCH
Attorney General

/s/ Charles W. Rumph
CHARLES W. RUMPH
Deputy Attorney General

CWR:sq

DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT
DIVISION TWO

Crim. No. 4261

Filed, Oct 2, 1967, Court of Appeal—First App. Dist., Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

vs.

FRED BANKS, DEFENDANT AND APPELLANT

BY THE COURT:

Cause submitted.

Dated October 2, 1967

/s/ Shoemaker, P. J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

DIVISION TWO

1 Crim. No. 4261

Filed, Oct 2, 1967, Court of Appeal—First App. Dist., Lawrence R. Elkington, Clerk, By (Illegible), Deputy.

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF AND RESPONDENT

v.

FRED BANKS, DEFENDANT AND APPELLANT

This case is before us for a third time. Our original decision was rendered on September 16, 1964, in which we affirmed the judgment of conviction. After petition to the United States Supreme Court, that court entered its order that the judgment be vacated and further that we reconsider the matter in view of its decision in the light of Griffin v. California (1965) 380 U.S. 609.

We did so, and after again thoroughly reviewing and considering the record, came to the conclusion that the rule set forth in People v. Bostick (1965) 62 Cal.2d 820, 823-827, applied and again we affirmed the judgment of the trial court on May 20, 1966.

Now we are again directed, after appellant's petition to the United States Supreme Court, to reconsider our determination in view of its decision in the light of Chapman v. California (1967) 386 U.S. 18.

In the Chapman case, the United States Supreme Court announced "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

We have given further consideration to this cause in the light of Chapman v. California, supra. We approve and adopt as part of this opinion and incorporate herein by reference our original decision of September 16, 1964.

As to the error in commenting and instructing on defendant's failure to testify, we declare a belief, based upon the conclusive evidence of his guilt, that such error was harmless beyond a reasonable doubt.

Judgment affirmed.

/s/ Shoemaker
SHOEMAKER, P. J.

WE CONCUR:

/s/ Agee
AGEE, J.

/s/ Taylor
TAYLOR, J.

Certification of Nonpublication

This opinion does not require publication in the advance sheets or official reports, under the standards provided by Rule 976, California Rules of Court.

/s/ Shoemaker
SHOEMAKER, P. J.

/s/ Agee
AGEE, J.

/s/ Taylor
TAYLOR, J.

SUPREME COURT OF THE UNITED STATES

No. 43 Misc., October Term, 1968

FRED BANKS, PETITIONER

v.

CALIFORNIA

On petition for writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 670 and placed on the summary calendar.

October 21, 1968

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 670

FRED BANKS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

THOMAS J. KLITGAARD
225 Bush Street
San Francisco, California 94104
Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 670

FRED BANKS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF FOR PETITIONER

Opinions Below

The California District Court of Appeal, to which this Court has issued its writ of certiorari, has rendered three opinions in this case. All were certified for nonpublication. The most recent was filed October 2, 1967 (A. 341); the two earlier opinions were filed May 20, 1966 (A. 332), and September 16, 1964 (A. 317).*

---

* Abbreviations used herein are "A." for Appendix, "Tr." for trial transcript, "P.X." for respondent's trial exhibits, and "D.X." for petitioner's trial exhibits.

The California Supreme Court denied petitioner a hearing, without opinion. Its order denying review was dated November 10, 1964; it is not reported in the official reports.

Jurisdiction and Background Proceedings

In an opinion filed September 16, 1964, the District Court of Appeal affirmed petitioner's conviction by a jury on charges of attempted robbery and robbery (A. 317). The California Supreme Court denied further review. On January 24, 1966, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari, vacated the judgment of affirmance, and remanded the case to the District Court of Appeal "for further proceedings in light of *Griffin* v. *California,* 380 U.S. 609" (*Banks* v. *California* (1966) 382 U.S. 420).

On remand, the District Court of Appeal reaffirmed the conviction. In an opinion filed May 20, 1966, it acknowledged that comment and instructions on petitioner's failure to testify were error, as contrary to the rule of *Griffin;* but adopting its prior opinion in full, the court went on to hold that "[i]n view of the abundant evidence of appellant's guilt, * * * it is not reasonably probable that a result more favorable to Banks would have been reached in the absence of the error" (A. 333-334). On May 15, 1967, this Court once more granted petitioner's motion to proceed *in forma pauperis* and his petition for a writ of certiorari to the District Court of Appeal, vacated the judgment reaffirming his conviction, and remanded the case to the Court of Appeal "for further consideration in light of *Chapman* v. *California,* 386 U.S. 18" (*Banks* v. *California* (1967) 387 U.S. 92).

On the second remand, the District Court of Appeal again affirmed petitioner's conviction. In an opinion filed October 2, 1967, it (1) approved and incorporated by reference its original opinion filed in 1964 (A. 341), and (2) without further discussion declared a belief, "based upon the conclusive evidence of his guilt," that comment and instruction on petitioner's failure to testify were "harmless beyond a reasonable doubt" (A. 342). Once again petitioner sought a writ of certiorari to the District Court of Appeal. By order dated December 26, 1967, the time for filing the petition was extended by Justice William O. Douglas to February 29, 1968. The petition was filed February 20, 1968, and was granted October 21, 1968, together with petitioner's motion for leave to proceed *in forma pauperis*. Jurisdiction rests on section 1257(3), Title 28, United States Code.

Constitutional Provisions Involved

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Questions Presented

1. Whether comment by the prosecutor and instructions by the trial court on petitioner's failure to testify were harmless beyond a reasonable doubt.

2. Whether use of "adoptive admissions" against petitioner as evidence of guilt, and also comment and instruction on such admissions, deprived petitioner of his privi-

lege against self incrimination and of his right to a fair trial.

3. Whether the line-up and other identification procedures used by the police and district attorney denied petitioner a fair trial, in violation of his right to due process of law.

4. Whether there was a denial of counsel at trial, when the court required petitioner to go to trial without counsel, after he refused to accept further representation by the public defender's office; and whether there was a denial of counsel on appeal, when the District Court of Appeal refused to appoint counsel to brief or argue petitioner's case on the two remands.

Statement of the Case

Petitioner Fred Banks, a 48-year old Negro, was convicted by a jury in the Alameda County Superior Court on August 7, 1962, on two counts of robbery and one count of attempted robbery. He was given concurrent sentences on all three counts and is presently serving an indeterminate term at Folsom Prison.

Count one charged petitioner with attempted robbery of a liquor store at 12th and Peralta in West Oakland. Count two charged him with robbery of a liquor store at 17th and Peralta, and count three with robbery of a liquor store at 16th and Linden, approximately ten city blocks away.

The principal issue in the case was one of identification, i.e., whether petitioner was in fact the robber.

A. The Attempted Robbery and Two Robberies

The evidence showed that the attempted robbery and the two robberies all took place on May 4, 1962, within a span of 20 to 30 minutes, and between 11:00 and 11:30 at night. An aggregate of $235-$265 was taken; $70-$100 from one liquor store, $165 from another. The sequence of events was as follows:

1. *Attempted Robbery (Liquor Store at 12th and Peralta)*

At approximately 11:00 P.M., a Negro wearing a hat and sportcoat entered the liquor store and walked to the sales counter, where there were two cash registers (A. 55-56; P.X. 19, A. 55). Harry Jow, an employee of the store, stood behind one cash register; his boss and part owner of the store, Roger Wong, behind the other (A. 54-56). The sales counter was on one side of the store, along a wall to the right of the entrance (P.X. 19, A. 55). Jow was at the rear cash register (A. 56). About five or six customers were in the store (A. 54, 74).

The robber came up to Jow and demanded "all your money" (A. 109). He had his right hand in his coat pocket indicating a gun, and rested the pocket on the counter, between Jow and Wong (A. 55, 57, 109). Jow talked with the robber while attempting to attract the attention of Wong, who was busy with a customer (A. 55-56, 109). Wong overheard the robber repeat the demand for money (A. 56). He took a "peek," and then reached under the counter, grabbed a .38 revolver, and brought it down on the robber's

pocket (A. 57). He did not hit anything hard like metal (A. 75). He told the robber to "[p]ut your hands up," but the robber refused (A. 57). Instead, he cursed Wong, and then walked out of the store and ran away (A. 57). Wong did not shoot, because of the customers (A. 57).

This was the first time in his life Wong had seen the person who attempted the robbery (A. 65). It was also the first time his store had been robbed (A. 77, 95). He was "plenty excited" (A. 82, 86, 95, 104). "Things happen so fast," he said, "you just take a quick look" (A. 83).

Jow too was "a little excited" (A. 110, 112, 117). When it appeared the robber had no gun, he had urged Wong to "[s]hoot him" (A. 57). Like Wong, he had not seen the robber before (A. 112).

The police arrived six or seven minutes after the robber left (A. 112). In the interval, Wong and Jow discussed his identification (A. 81-82, 96). Jow had seen the robber better than Wong because he had faced him more (A. 94). When the police arrived, the investigating officer did not question Wong or Jow separately; instead, he questioned both about the identity of the robber at the same time, in the presence of each other (A. 81-82, 112). Neither made an independent identification, and neither could later remember with certainty what portions of an identification he gave the officer (A. 81-82, 87, 94, 112-114). "I answered a little bit," Wong said, "he answered a little bit. We piece it together" (A. 82).

The officer's report listed the robber as a male Negro, 50 years old, 5′6″ tall, 150-160 pounds, medium build, dark complexion, with dark trousers, a yellow plaid shirt, and

dark sport jacket (P.X. 9 for identification, A. 37). It did not refer to any scars, mustache, or other distinguishing characteristics.

2. *Robbery (Liquor Store at 17th and Peralta)*

At approximately 11:15 P.M., a Negro wearing a hat and sport coat walked into a liquor store some five and one-half blocks away from the attempted robbery and directed the clerk to "[h]and over the money" (A. 126, 129).[1] The clerk, Robert Perry, thought he was kidding, and turned to wait on another customer, who also had just walked in (A. 127, 164). But the robber repeated his demand: "If you don't want to jeopardize your life, hand over the money," he said, "And I'm not kidding" (A. 127). Perry then saw that the robber had his right hand in his coat pocket and was waving the pocket back and forth, simulating a gun (A. 127). Perry walked to the till, opened it, and handed over part of the money (A. 127). "That isn't all. Give me all of the money," the robber said (A. 127). Perry complied (A. 128). The robber then backed out of the store, and ran away (A. 130, 162).

---

[1] The prosecutor introduced in evidence a specially prepared diagram that showed the streets and general vicinity in West Oakland where the various offenses took place, and also the location of the store some distance away where the petitioner was arrested (P.X. 28, A. 43, 49, 249). While this case was still pending in the Court of Appeal, on the initial remand for further consideration in light of *Griffin* v. *California* (1965), 380 U.S. 609, the district attorney's office removed the diagram and all other trial exhibits from the files of the Superior Court (Alameda County Superior Court files, Action No. 33698, item #40 (exhibit record)). The district attorney's office then destroyed a number of these exhibits, including the diagram. Because of this, references to distances herein are based upon a standard "Alameda County Popular Street Atlas" (1968), prepared by Thomas Bros. Maps.

In the meantime, the other customer, George Griffith, had run out of the store as soon as he heard the robber say "I'm not kidding" (A. 127-128, 162). On the way out, he met Robert Jones, another customer who was just entering (A. 164-165, 178). Griffith said, "That man is holding up the liquor store", but Jones thought he said, "They are closing up," and rushed inside (A. 165; see also A. 153, 178). Jones almost knocked the robber down trying to get in (A. 153, 178). The robber, in turn, had backed right into Jones, as he was running out the door (A. 153). Griffith, on the outside, followed the robber for 10 or 15 steps, until he turned a corner (A. 165). Perry then called the police (A. 133, 165).

When the police arrived, Griffith told the investigating officer that the robber was wearing a gray striped coat, a grayish hat, and a yellowish-looking shirt (A. 165-166). He also said that the robber had a scar on the left side of his face, and located it variously on the cheek; right down on the jaw; and by the lip, by the corner of the nose (A. 166). He did not know whether the robber had a mustache, or hair on his lower lip (A. 175), or whether the robber's shirt had a flower on it (A. 175).

Perry also described the robber to the investigating officer (A. 133). Apparently Griffith was present (A. 166). Perry said the robber was a Negro, that he was wearing a sport-coat, and that he had a scar on the left side of his face (A. 136-137). He did not pay any attention to the shirt (A. 129, 137), or to whether the robber had a tie (A. 129, 137). Nor, as he told the officer, was he "directly sure" of the color of the robber's hat (A. 133). In the nearly 12 years Perry had worked at the liquor store, this was the first time he had been robbed (A. 141, 143).

Jones did not describe the robber to the officer (A. 183). The only information he gave was that the robber "backed up in my arms," with the money in one hand and the other hand in the pocket (A. 183). He did not see a beard on the robber, or a goatee on his lower lip (A. 180-181). Jones had not yet been drinking, but "was just fixing to start" (A. 189).

The investigating officer's report listed the robber as a male Negro, 45 years old, 5'9" tall, 180 pounds, husky build, dark brown complexion, with a brown hat, dark grey sport coat, and dark trousers (P.X. 11 for identification, A. 37). The sole "identifying characteristic" listed was a "small scar left side of mouth." There was no reference to a mustache or goatee. Under "trademarks (peculiar actions)" was the single word, "nervous."

The robber took between $70 and $100 (A. 147-148, 262).

3. *Robbery (Liquor Store at 16th and Linden)*

At approximately 11:30 P.M., a Negro wearing a hat and sport coat or sport jacket entered a liquor store about 10 blocks away from the above-described robbery, and 22 blocks away from the attempted robbery (A. 190-191, 194, 203). He came up to the counter (A. 191). The owner of the store, William Pauletich, did not notice him "too much," because he had two other customers (A. 191). Then, when he got to the counter, Pauletich saw that he had his hand in his pocket and was "pointing it toward me, like he had a gun in there" (A. 191). The man, according to Pauletich, was "very calm" (A. 191). "He didn't—wasn't threatening or anything, demanding money quickly, or anything like

that, but he kind of hesitated for a little while, both of us" (A. 191).

When the robber pointed to the cash register, Pauletich's mother got up from a chair about six feet away and asked what the man wanted (A. 192). Pauletich thought the robber said, "I want the money" (A. 192). In any event, Pauletich said, "he wants the money out of the register" (A. 192). So his mother handed over the money, all in currency (A. 192). Pauletich, meanwhile, was taking a few steps one way, and a few another way, behind the counter (A. 192, 201). The robber, still calm, told Pauletich to "[g]o ahead and press the button and notify the cops, if you want" (A. 201). He then took the money and ran out the door, "going quite rapidly" down the street, back towards Peralta (A. 192-193). Pauletich did not know whether the robber put the money in his pocket, or kept it in his hand (A. 204).

A passerby, Sam Slaise, saw a man come out of the liquor store around 11:30 P.M. and go down the street, walking fast (A. 220-222, 225). The man had money in one hand, his left, and his other hand in a coat pocket (A. 223). Slaise saw him for a block and a half or so, and saw him get into a car (A. 224). He could not identify the car or the man, because it was dark (A. 225). Nor could he tell what kind of clothes the man was wearing (A. 225). He could not recognize the man if he saw him again (A. 225).[2]

---

[2] Petitioner's objections to Slaise's testimony, on the ground he did not identify the man who came out of the store as petitioner, were overruled (Tr. 471, 472, 477). "[W]hether he has proven anything or not is for the jury to determine," the court said (A. 225). Later it denied a motion to strike this testimony (A. 237).

As soon as the robber left, Pauletich called the police (A. 195). Officers arrived 5 or 10 minutes later (A. 210). Pauletich told them that the robber was a colored person, about 5'8" tall and 150 pounds (A. 195), or "about my size" (A. 195), and that he was wearing a sportcoat and hat (A. 195). He did not give a description of the robber's trousers (A. 195), nor did he notice whether the robber had a mustache (A. 197, 209), nor was he too sure about a scar (A. 195). He did not know for sure if the robber had any hair on his lower lip (A. 197). He did not remember how old he said the robber was (A. 197).

There was no evidence that Pauletich's mother gave the police a description of the robber. Nor, apparently, did Slaise.

The investigating officer's report listed the robber as a male negro, 40-50 years old, 5'9" to 5'10" tall, 170 pounds, medium build, medium dark complexion, with a "spt. coat brn & grey check hat?" (P.X. 13 for identification, A. 38). No mention was made of a mustache, chin whiskers, or scar (*ibid.*). Nor were any "identifying characteristics" or "trademarks" noted.

The loss was set at approximately $175-$200 (*ibid.*). Later it was reduced to $165 (A. 198).

B. The Arrest

Shortly before midnight the same evening, petitioner was arrested while standing in a liquor store at 21st and Market Streets in West Oakland (A. 226-228, 238-239). This was about eight blocks northeast of the last liquor store robbed at 16th and Linden, and in a different direction from the westerly path taken by the robber when he

ran out of the store. It was about 18 blocks from the first robbery and about 21 blocks from the attempted robbery.

Petitioner had been in the Market Street store for somewhere in the neighborhood of five minutes before his arrest (A. 230, 234). He had made no attempt to rob the store (A. 230), nor was he subsequently charged with any criminal conduct there (A. 1-3).

He had been talking with the clerk on duty (A. 229-231, 234). Apparently the clerk told him about a woman employee who had been killed at the store a while before (A. 234). Petitioner asked the clerk if he had a gun, and when questioned "Why do you ask that," said to the clerk, "Well, I might want to hold you up" (A. 228, 231). About this time, some police officers walked in (A. 228). The clerk told them that he did not like what petitioner had said (A. 228). Petitioner, in the interval, had ordered a half pint of Old Taylor and was standing in front of the counter (A. 228).

One officer told the clerk that some places had been held up, and said to petitioner, "Buddy, you fit the description,"[3] and began to search him (A. 228). He took some crumpled money out of the breast pocket of petitioner's shirt, and put it in his own pocket (A. 239). He did not find a gun (A. 232, 239, 244). The evidence did not show how much money the officer found (A. 232, 239-241), but later, at police headquarters, he continued the search and took "some more money out of his [petitioner's] other

[3] When the police officer made the accusation, "Buddy, you fit the description," petitioner remained silent. The prosecutor later stated to the jury that petitioner's silence under these circumstances was an "adoptive admission" of guilt, and instructions of like nature were given by the Court (see pp. 71-78, below).

pocket and his wallet" (A. 239). The total for both searches was $176 (A. 240).

When the officer asked petitioner where he got the money, after searching him at the store, petitioner said that he was working and that he had earned his money (A. 231, 233, 247-248). He said that he lived in Pittsburg, a town about 30 miles from Oakland (A. 248). He told the officer that if he called to Pittsburg, he could verify the statement as to the money (A. 248). The officer, however, did not investigate along that line (A. 248). Disregarding petitioner's further statement that he had not robbed anyone (A. 248), the officer placed him in the patrol car with another officer, and drove off (A. 240, 247).

C. The Identification Procedures

1. *Liquor Store at 16th and Linden*

Instead of taking petitioner directly to police headquarters, the arresting officer drove him to the liquor store at 16th and Linden, the scene of the second robbery (A. 240). A sergeant and patrolman were already there (A. 245). The arresting officer left petitioner in the car and went inside the store, where he talked with the two officers (A. 245). He then turned petitioner over to the sergeant (A. 245). Petitioner was taken from the car and brought into the store (A. 245-247). An officer was on either side of him; one had him by one hand, another by the other hand (A. 199).

Pauletich, the owner of the store, saw petitioner and the two officers coming in (A. 199). He did not tell these officers that the store had been robbed; he presumed they knew it and understood what had happened (A. 199, 209-

210). He was standing behind the counter, and moved to one end so that he could see better (A. 199). When the officers asked if this was the man, Pauletich said, "Yes, that is him" (A. 200). At one point, not entirely clear from the record, he moved around from the counter to get closer to the officers and petitioner (A. 200). The whole procedure took "just a matter of a moment or so" (A. 200).

Like the robber, petitioner was wearing a sportcoat and hat (A. 194, 201). He was also the only Negro in the group—Pauletich and the two officers being Caucasian (A. 201; P.X. 7 for identification, A. 36). Pauletich was not sure whether there was anyone else in the store at the time with a hat and sportcoat (A. 219). "There was a little excitement going on," he said (A. 219).

Petitioner had been brought to the store about 30 minutes after the robbery occurred (A. 193, 199). He stayed "a very short time" (A. 201). He was then put back into the police car and transported to the Inspector's Division at the Oakland Police Department (A. 240, 246). He was not arraigned or taken before a magistrate (A. 62), but was further searched for money by the arresting officer (A. 240-241), and held for a line-up the following morning.

2. *The Line-Up*

The next morning, May 5th, petitioner was exhibited in a line-up to Wong, Jow, Perry, Griffith and Jones (A. 169, 182). Pauletich, who had seen petitioner the night before, was not present. Jow and Wong were witnesses to the attempted robery at 12th and Peralta (pp. 5-7, above); Perry, Griffith, and Jones were witnesses to the later, actual robbery at 17th and Peralta (pp. 7-9, above).

On the morning of the 5th, the police had called Wong and told him they had a suspect, and to come down and see if he could pick him out (A. 67-68, 92). An inspector had made a somewhat similar call to Perry (A. 153-154, 158-159). Perry did not want to go, because he had work to do; but he was asked to see if he could identify the suspect, and that was the only reason he was there (A. 158-159).

All five, Wong, Jow, Perry, Griffith, and Jones, met at police headquarters (A. 168-169). An officer gathered them together and from there walked them over in a group to the jail at city hall, about two blocks away (A. 168-169). It was not clear whether they discussed the identity of the robber (A. 150-152). At city hall, they took an elevator to the jail (A. 151, 169). There was some talk in the elevator (A. 151-152), and Perry, in the presence of at least some of the others, said that if he "saw the guy again in the next hundred years, I would be able to identify him, because I got a good look at him" (A. 151-152). Perry was "hot," because had lost a day's pay (A. 152). He was also worried about how long the identification would take, since he did not want to get a parking ticket (A. 153).

At the jail, Wong, Jow, Perry, Griffith and Jones were all herded into a small room (A. 68). There was a door at the other end of the room and a small window that looked out into a narrow corridor (A. 169; D.X. B, A. 106). The inspector who had called Perry was present in the room and conducted the line-up (A. 153).

Lined up in the corridor, under numbers painted on the wall, were petitioner and four other Negroes (A. 170; D.X. B, A. 106). Petitioner, at 48, was noticeably older than the

rest, who were mainly "young guys" (A. 101-102, 171; D.X. B). He was also dressed differently (A. 171; D.X. B). He stood in the middle of the line-up, at the number 3 position (A. 69, 140; D.X. B). On his immediate left was a man dressed entirely in light colored clothes, with a light shirt, light trousers, and light colored windbreaker jacket (D.X. B). Further to the left was another man in a windbreaker jacket; he also had on light colored trousers and shirt (*ibid.*). To his right were two youths in dark trousers (*ibid.*). The closest had on a loose sport shirt covered with large polka dots; the other, a light shirt with rolled-up sleeves, and a suit vest (*ibid.*). Petitioner, standing in the middle, was the only one dressed like the robber, with both a sport coat and hat (D.X. B; A. 171). He had on dark trousers and a yellow shirt (D.X. B; A. 70).

Perry went to the window first (A. 135). Like the rest, he had been told "to look straight through the glass and see if [he] could see the suspect" (A. 116, 139). He had also been told, "No talking" (A. 139). The inspector asked Perry if he saw the man who held him up, and Perry said, "Yes, I saw the suspect. I saw the one that robbed me" (A. 157-158). All this took place in the presence of the others, who were waiting their turn to look through the window (A. 89, 169, 171).

Griffith apparently was next (A. 169-170). Petitioner was standing bareheaded (A. 170). The inspector asked Griffith if he could identify anyone in the line-up (A. 171), and after petitioner put his hat on, Griffith said, "Yes, that is the man right there with the hat on" (A. 170-171). He did not see anyone else wearing a hat (A. 171), nor did he pay any attention to whether anybody else in the

line-up had a scar on his face (A. 172). He looked at nobody but petitioner (A. 172). "Ain't nobody else have their coat on," he said, "because them other guys was young guys" (A. 171).

Wong was third or fourth to the glass (A. 89-90). The inspector told him to "[p]ick the person out" (A. 89)—to "pick out the right one and be pretty sure" (A. 94). Wong then looked for the man he was supposed to pick (A. 70-71, 92-93, 103-104).[4] He identified petitioner by his face and clothing (A. 69). At first, all he saw was the sport coat and yellow shirt (A. 70). And although he testified he could identify petitioner at that point, he "wanted to make sure" (A. 60, 70). So he had petitioner put on his hat (A. 60, 70), and then made an identification (A. 59-60, 69-70).

Wong did not remember whether anyone else in the line-up wore a sport coat (A. 70-71), nor did he pay much attention to how many of the others had hats (A. 70).[5] He did not remember how many appeared over 50

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[4] Wong, of course, knew the police had a suspect whom they believed had committed the attempted robbery (A. 67-68, 92). On the telephone, they told him about the line-up and that he was "to pick out one, to see if it is the right one, and make sure it is the right one * * * " (A. 92).

At the line-up, the police told Wong, "There are quite a few people in there, a different bunch we can bring in," and that if he couldn't "pick out one in the same line up, to pick the next bunch" (A. 92). The police, however, did not show him any line-up other than the one with petitioner (A. 92-93).

[5] On direct examination, Wong testified that everyone in the line-up put on a hat (A. 60). Later, on cross examination, he was less certain (A. 70-72, 73). He admitted he told the court at the preliminary hearing that some had hats, but others did not (A. 71-72).

years old (A. 93, 101), or had mustaches or beards (A. 93). But he said that none had a scar (A. 93).[6]

Jow looked through the glass, but could not make a positive identification (A. 116, 121, 125). His view was blocked (A. 125), and the glare on the glass affected his vision (A. 116, 121). He told the inspector that the third person resembled the robber (A. 116). This person was wearing a hat, sport jacket, and yellow shirt (A. 116). At one point, he told the inspector that such person looked "exactly like the fellow that came and robbed the store" (A. 117). But despite this statement, Jow was still not too sure (A. 121, 125), and told the inspector so (A. 116, 123, 125).

Jones saw petitioner without his hat on, but dressed in a sport coat and dark trousers like those worn by the robber (A. 182-183, 186). Then the police said, "Put your hat on," and Jones said, "Well, that's the man" (A. 183). Jones did not recall talking directly to the inspector when he made the identification (A. 185). "[W]e was all talking together," he said (A. 185). He did remember telling someone at the line-up that petitioner looked like the robber (A. 186). But this man was not dressed in police clothes, and Jones did not know his name or what he was (A. 186).[7]

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[6] Wong contradicted himself several times in explaining why he could remember some things about the line-up, but not others. As to how many persons wore sport coats, he said, "I studied faces" (A. 93, 100). Later he said, "I studied them [the persons in the line-up] one by one" (A. 101); but as to how many had beards and mustaches, he said, "I am supposed to pick the right one, I am not supposed to study everyone of them" (A. 93).

[7] Jones said that he saw other suspects put on hats (A. 186). The court, however, cut off petitioner when he began to cross examine Jones on how many hats he had actually seen (A. 186).

Sometime during the course of the line-up the inspector asked that anyone who could positively identify the man go outside, into the line-up corridor, and point him out (A. 121, 131). Perry, the first viewer, said that he could (A. 131). Together he and the inspector went into the corridor, through the door from the line-up room (A. 121, 131-132). The evidence shows that Perry came face to face with petitioner, pointed directly at him, and said, in substance, "[T]hat was the man who held me up" (A. 132). Petitioner did not deny the accusation, but remained silent and said nothing (A. 132). The record does not disclose whether anyone back in the small room heard the accusation.[8] But Griffith said that he saw "two guys" go up and put their hands on petitioner, while he was looking through the glass window (A. 169), and Jow at least was aware that at some point the door had been opened and "two of the boys" had gone out to the line-up to identify the robber (A. 121). But he did not know which one was identified, because he was in the back of the room (A. 121).[9]

After the line-up was over, the inspector or someone else permitted Wong to examine the back of petitioner's hand, where Wong claimed to have struck the robber with

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[8] The prosecutor argued to the jury that petitioner's silence in the face of Perry's accusation at the line-up was an "adoptive admission" of guilt (A. 298-299), and the trial court so instructed the jury (A. 305) (see the discussion at pp. 71-78, below).

[9] It is not entirely clear when, in fact, Perry went into the line-up corridor, to confront petitioner with his accusation. At trial, however, the prosecutor asked Perry about a confrontation in terms of one occurring after Perry had already identified petitioner in the line-up (A. 131). Griffith's testimony would indicate this confrontation occurred almost immediately after Perry went to the window (A. 169-170).

his .38 (A. 59, 74-75; see also pp. 5-6, above). All Wong saw was a black spot (A. 60). He could not, or would not, say whether the hand was swollen (A. 73-74).

The inspector's line-up notes listed Jow as "not too sure"; Griffith as picking number 3 (petitioner) to look like the man, but "not too positive"; and Jones as positive, "[a]fter he saw him with hat on" (P.X. 3 for identification, A. 35).

3. *The Preliminary Hearing*

On May 16th, there was a preliminary hearing on all three counts, after which petitioner was held for trial. The prosecutor did not call Jow, Griffith or Jones, but only Wong, Perry and Pauletich.

The line-up played an important role at the preliminary hearing. Wong, the first identification witness, was cross examined at length about what he saw, in an attempt to separate the line-up from his independent recollection of the appearance of the person who had been in his store (Tr., Preliminary Hearing, pp. 12-19, 28-30). Wong said that he could not remember who went to the window first, but denied hearing what the viewers before him had said (Tr., Preliminary Hearing, p. 18). He admitted that he had talked about the facial characteristics of the person with Jow, on their way down to the line-up (Tr., Preliminary Hearing, p. 30). He also admitted that he was not sure that the hat worn by petitioner in the line-up was the same hat he saw at the time of the attempted robbery (Tr., Preliminary Hearing, pp. 15-16). Nor was he too sure about what he saw on the back of petitioner's hand, after the line-up. "Well, look like he got a dark spot over

here," he said, "but I don't know if I do it or not" (Tr., Preliminary Hearing, p. 19).[10]

Perry, the second identification witness, acknowledged that he had committed himself to an identification of petitioner, at the line-up (Tr., Preliminary Hearing, pp. 38-45). He admitted that before he saw petitioner in the line-up, he had been asked by the police "to come down to see if I could identify the suspect" (Tr., Preliminary Hearing, p. 39). He said that he could not tell the court what the other men in the line-up looked like, because "I didn't pay any attention to them" (Tr., Preliminary Hearing, p. 44).

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[10] Immediately before Wong's denial that he heard any of the first persons to the window identify petitioner, the trial court plainly recognized the prejudice to which Wong had been exposed:

"Mr. Shaughnessy [assistant public defender]:

Q. Now, Mr. Wong, who was it that looked through the window at the people in the line up first?

* * * * *

"Mr. Whyte [deputy district attorney]: I object to this as irrelevant. The man stated he saw the line up and made the identification when he looked. Who looked first, I believe, is irrelevant.

"Mr. Shaughnessy: Your Honor, if I may be heard on this, *the district attorney has been through enough preliminaries where identification is the problem to know that the description of the people looking at suspects, and what is said, is crucial to the validity of the identification.* It is hard to believe that the objection is made in seriousness.

"Mr. Whyte: The objection is made in the utmost of seriousness.

"The Court: He identified the defendant in court. *I assume what you want to find out is whether somebody said, 'Oh, it is number 3', sitting next to him, or something like that.*

"Mr. Shaughnessy: *Precisely.*

"The Court: Overruled" (emphasis added) (Tr., Preliminary Hearing, p. 17).

Pauletich, the third identification witness, admitted on cross examination that he had seen petitioner between the time of the robbery and the in-court identification, when petitioner had been brought into his store between two police officers, who were holding him by the hands (Tr., Preliminary Hearing, pp. 52-53). He recited that the officers had asked if this was the man, and that he had said, "Yes" (Tr., Preliminary Hearing, p. 53). He was not certain whether the police had also shown petitioner to his mother, who had been sitting in the vicinity of the cash register at the time of the robbery and who had handed the money over (Tr., Preliminary Hearing, pp. 47-48, 53).

Conflicts between the preliminary hearing testimony of the prosecution witnesses, and their later testimony at trial, were brought to the frequent attention of the jury, in refreshing the recollections of these witnesses and on impeachment (e.g., Wong: A. 70-73, 75-77, 78, 79-80, 87-89, 90, 98-99; Perry: A. 146, 147-148, 150, 158-159; Pauletich: A. 202-203, 204, 217-218). It was pointed out, for example, that at the preliminary hearing Perry admitted being asked down to the police station to identify "the suspect," a term he did not first remember at trial, but later conceded was used (A. 158-159); that Pauletich had originally described the robber as wearing a "sport coat, jacket sport coat, and a hat," but later only a suit-type sport coat and hat (A. 202-203, 210-211; Tr., Preliminary Hearing, p. 49);[11] and that Wong had placed a "little scar" on the

[11] There was no satisfactory resolution of the conflicts in Pauletich's testimony as to what the robber wore—whether a sport coat and a sport jacket, or only a coat, or only a jacket (A. 202-204, 210-211); and at one point, Pauletich claimed he may have said the clothing was a "sport coat" *or* "sport jacket" (A. 203). As the trial court observed, the question had been asked "about six times, and we haven't got the same answer twice" (A. 211).

right side of the robber's face in the preliminary hearing, but changed this to the left side at trial (A. 75-77).

4. *The Use of Photographs*

As already noted, three of the persons who saw petitioner in the line-up were not called to testify at the preliminary hearing (p. 20, above). They were Jow, Griffith, and Jones. These were the three least positive in their identification of petitioner, according to the inspector's line-up notes (P.X. 3 for identification, A. 35).

In July, shortly before trial and about two and one-half months after the line-up, a police officer brought a photograph of petitioner to Jow, either at his home or the store where he worked (A. 117-118, 122). It was delivered along with a subpena to appear for the trial (A. 122).

The photograph was in black and white (D.X. A, A. 91). It was made up in two parts—one, a profile view of the right side of petitioner's face and shoulders; the other, a straight-on, frontal view of his face and upper chest (*ibid.*). In both, petitioner was shown in a light sport shirt and dark sport coat, with the collar turned up in back (*ibid.*). In neither did he wear a hat (*ibid.*). Across petitioner's chest in the frontal view was a placard with the number "148235," the words "Oakland Calif.," and the date "5 May 1962" (*ibid.*). On the back of the photograph was a complete description of petitioner, giving his name, birthdate, height, weight, complexion, and color of hair and eyes (*ibid.*).

The officer who delivered the photograph asked Jow if the person shown was "the fellow that came and robbed

[i.e., attempted to rob] the store" (A. 117). Jow looked at the photograph (A. 117). It refreshed his memory of petitioner (A. 118, 122) and made him sure he was looking at the robber (A. 126).[12]

Jow said that he mentioned the photograph to his boss, Wong, but did not tell him anything about it (A. 122). According to Jow, only his mother was present when the officer showed him the photograph (A. 122).

Griffith too was shown a photograph of petitioner (A. 172-173). This occurred at the district attorney's office, about two to three weeks before trial (A. 173-174).[13] In viewing the photograph, Griffith just looked at petitioner's face, without paying attention to his clothes (A. 173). He did not notice any scars (A. 173). But he said he knew "it was [petitioner] when he showed me the picture" (A. 174).

Griffith denied that the picture refreshed his memory of the robber or the robbery (A. 174); on the other hand, he admitted that it had refreshed his memory of the defendant (A. 174). His testimony attempted to illustrate the distinction:

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[12] Jow contradicted himself several times concerning the influence of the photograph. At one point, he denied that the photograph had helped to refresh his memory, or that his memory needed to be refreshed (A. 124). He also denied that the photograph helped him to make up his mind in identifying petitioner (A. 120-121). But elsewhere, he admitted that after looking at the photograph, he was "pretty positively sure [that petitioner] is the one" (A. 120-121, see also A. 126), and conceded that he had not been too sure of an identification at the line-up (A. 121, 125).

[13] Griffith could not remember the exact date he went to the district attorney's office (A. 172-173). He was supposed to have been there on July 16th, but someone had called him and cancelled the appointment (A. 174).

> "I know it was you when they showed me the picture, *but I didn't think of no robber or nothing when he showed me the picture.* When he showed me the picture, I said, 'Yes, that's the guy that did the robbery' " (emphasis added) (A. 174).

Jones also was shown a photograph of petitioner (A. 181). He said that he had to leave work and come to the courthouse building about a week and a half to two weeks before trial (A. 181, 186). There he discussed the identification of petitioner with someone whose name he could not recall, but whom he guessed was a district attorney (A. 188). He discussed the type of hat and coat worn by defendant, and also whether defendant had a mustache (A. 188).[14] When shown the photograph, he recognized petitioner as the same person he had seen in the line-up (A. 186). But he denied that the photograph had refreshed his memory of this person (A. 186-187). "I just knew it," he said (A. 187). He then interjected, in a non-responsive answer to one of petitioner's questions, that he had seen the person in the picture at the place that was robbed (A. 187).

When asked whether he would have been able to pick out the defendant in the courtroom without the aid of the photograph, Jones refused to make a direct reply: "There was no one in here that looks just like him but him," he said (A. 187). Then, when the court intervened and de-

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[14] At trial, Jones testified that the robber had a "little mustache" (Tr. 408). The "mug" shots taken May 5th showed petitioner with a mustache (D.X. A). They also showed a clipped, goatee-like set of whiskers under petitioner's lower lip (*ibid.*); as to this, Jones testified that he did not see either a goatee on the lower lip of the robber or a beard (A. 180-181).

manded an answer, he said that he could (A. 187). Later he admitted that the only identification he could give the district attorney was that the defendant "looks like" the robber (A. 189). Jones, of course, acknowledged that he had told the district attorney how the robbery had occurred (A. 188).

Of the three witnesses who did testify at the preliminary hearing, Wong was the most certain that he had not been shown a photograph of petitioner prior to trial (A. 94). Perry at first thought he had seen a photograph, but eventually said he did not remember (A. 135-136). Pauletich too said that he did not remember a photograph (A. 204-205). Later he said that he remembered discussing the case with a police inspector who had come to his store, but did not think the inspector had shown him a picture of the defendant at that time (A. 209).[15]

The Trial

The trial began July 30, 1962 (A. 26). It lasted approximately seven court days (Clerk's Transcript on Appeal, pp. 15-32). Over five days were occupied by the presentation of evidence (*ibid.*). The State called eleven persons to testify; the defendant, five (*ibid.*). There was extensive cross examination of the persons called by the State (*ibid.*). The defense rested on the facts developed through cross examination, the direct testimony of defendant's witnesses, and the presumption of innocence (A. 27-28). Defendant himself did not testify (see pp. 44-45, below).

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[15] It is not clear from the record whether Jones, Griffith and Jow all saw the same photograph(s) of petitioner. Jow saw the "mug" shots (D.X. A, A. 91; see p. 23, above). The only other photograph of petitioner produced at trial was one showing him in the line-up (D.X. B, A. 106).

Three charges were at issue: attempted robbery of Wong (count one); robbery of Perry (count two); and robbery of Pauletich (count three) (A. 29-30). Further charges, that petitioner had been convicted in Illinois, in 1936, for robbery, armed robbery and murder and had served a subsequent prison term at Joliet, had been admitted at arraignment (Tr. 5) but were not before the jury (A. 29-30).[16]

The questions for the jury were whether defendant, beyond a reasonable doubt, had committed each of the three offenses charged. In short, whether the defendant was the robber—and not someone else—in each instance (A. 26-27, 268).

Motions for separate trials on each of the three counts were denied (Tr. 5-8, 10-12, 13-14; Clerk's Transcript on Appeal, pp. 4, 5, 7). So were requests by defendant, starting several weeks before trial, for an opportunity to talk to an expert on the mental factors that influence identification-making decisions (A. 26-27, 235-236; Clerk's Transcript on Appeal, pp. 10, 29). Requests during trial to subpoena one such expert (Dr. Kirk of the University of California at Berkeley) to testify on the causes of mistaken identification were also denied (A. 212-216, 235-236).[17]

The defense was conducted without counsel, by the defendant, in *pro per*. An assistant public defender sat inside

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[16] Petitioner had been in California since 1960, on parole, after serving about 22 years on the Illinois convictions (Tr. 42-43). When arrested on the present charges, he was working in Pittsburg, California, as a plumber (Tr. 42).

[17] Petitioner was not able to contact witnesses on his own, since he had been kept in jail from the time of his arrest and throughout the trial (Tr. 26, 532, 539, 638). The record suggests he did not have sufficient funds to post bail, set at $21,000 (Tr. 17; Tr., Preliminary Hearing, p. 54).

the rail, to give advice if requested, but was not permitted by the court to raise objections or speak during trial (Tr. 17-19, 55-56, 59-60).[18]

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[18] Until about two weeks before trial, petitioner had been represented by the public defender, who appeared in person or through an assistant at both the preliminary hearing and arraignment (Tr., Preliminary Hearing, p. 2; Tr. 3-6). Petitioner then moved for the appointment of outside counsel, on the ground that the public defender's office had lost an unduly large number of cases and appeared, in his opinion, to have an organization that was no match for the district attorney's office (Tr. 15-16). The court denied the motion, but allowed petitioner to proceed in *pro per* when he refused to continue with the public defender (Tr. 16-19). Because of the nature of the charges, though, the court ordered the public defender to have a member of his office sit in court and be available to defendant (Tr. 17-19). The public defender objected to this procedure, calling defendant a "wise guy" in front of the judge and arguing that "this mixed marriage won't work" (Tr. 18).

Shortly thereafter, before a different judge, petitioner renewed his motion for outside counsel (Tr. 30, 34). He said he did not believe the public defender was qualified (Tr. 32-33) and that he would rather have a private lawyer, "because he has a reputation to uphold and * * * is going to fight for his reputation" (Tr. 34). This motion too was denied (Tr. 39-47), though it was brought out that petitioner had only a 6th grade education (Tr. 42), that he had been hospitalized in a mental institution while serving time in Illinois (Tr. 43), and that he was emotionally upset about the charges because he had said he was not guilty (Tr. 44).

The motion was made a third time, immediately before trial, when petitioner asked for any counsel other than the public defender (Tr. 54). Again it was denied (Tr. 54). Petitioner repeated that he was entitled to counsel he believed competent (Tr. 55) and objected to the order for the assistant public defender to sit in the courtroom, but was overruled (Tr. 59).

For further details on the pretrial hearings concerning right to counsel, see the argument (pp. 97-106, below).

A. Evidence Adduced

1. *State's Case*

(a) *Preliminary Exhibits and Testimony*:

The State opened its case by marking for identification, in front of the jury, a series of documents, notes and reports (A. 33-39). These were introduced through the police inspector who had been in charge of investigating the case (A. 33).

The inspector first identified a list of persons contacted during the investigation (P.X. 1 for identification, A. 33-34); his notes of conversations with witnesses (P.X. 2, 4, 5 and 6 for identification, A. 34-35); his *notes of a conversation with defendant* (P.X. 6 for identification, A. 35); notes made during the line-up (P.X. 3 for identification, A. 35); the "arrest report" (P.X. 7 for identification, A. 35); and "robbery and theft" reports for each of the three liquor stores covered by the charges (P.X. 8-9, 10-11, 12-13 for identification, A. 36-38).

Next he identified a two-page "case report" (P.X. 14 for identification, A. 38). He said that he typed this document after the investigation and that it contained *"the information needed for prosecution of this case"* (emphasis added) (A. 38). In response to a question by the district attorney, he said the report referred to all three counts (A. 38).

Finally, the inspector identified a three-page document, which he described as the statement he took from the defendant on the 5th of May (P.X. 15 for identification, A. 38-39). Petitioner immediately objected to the statement

"being admitted in evidence," but was overruled (A. 39). The inspector then concluded by stating that all notes of conversations and all statements taken during the investigation were included in the documents he had just examined (A. 39).

No explanation was made to the jury by the inspector, the district attorney or the court, that the May 5th statement was not a confession or other admission of guilt, but in substance a denial of the charges (P.X. 15 for identification, *supra*). Nor was it explained that the notes of the conversation with defendant (P.X. 6 for identification, *supra*) showed that he had claimed innocence, rather than incriminating himself. Instead, the court dissuaded petitioner from asking questions about the various documents (A. 40-41), and implied, by comments in the presence of the jury, that their contents were somehow harmful to him (A. 41).[19]

Next, the State showed the jury a diagram of the streets in West Oakland (P.X. 28, A. 43, 249). The diagram was not drawn to scale, nor did it show actual distances (A. 45-47). But over petitioner's objections, it was marked by an employee of the district attorney's office to show the locations of the places involved in the case and their relationships to each other (A. 45-49).[20]

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[19] The district attorney stated that his only purpose of offering the documents was to put on the record they had been delivered to defendant (A. 41). He did not explain why he chose to do this in front of the jury, particularly since receipts for most of them (including the May 5th statement, the robbery reports, and the case summary) had been signed by defendant and were already on file with the court (Clerk's Transcript on Appeal, pp. 12, 19 and 21).

[20] The court said that the diagram could be used to show the locations of streets, but not distances (A. 46, 47, 249). It overruled

(b) *The Attempted Robbery and the Two Robberies*:

Then came testimony to the events in the various liquor stores, the time sequences between the offenses charged, and the identity of the robber. Much of this testimony has already been described elsewhere in this brief (see pp. 5-11, above). It was given, in sequence, by Wong and Jow (count one), Perry, Griffith and Jones (count two), and Pauletich and Slaise (count three).

Wong and Perry, on direct examination, testified in part to identifying petitioner in the line-up (A. 59-60, 129-130, 131-132); Perry, in addition, testified to petitioner's silence, when accused in the corridor, outside the line-up room, of being the man who held him up (A. 131-132). Pauletich, on direct examination, testified to identifying petitioner in his store, when brought there on the night of the robbery, by the police (A. 193-194).

Cross examination of Pauletich later exposed the other circumstances of the in-store identification (see pp. 13-14, above). Similarly, cross examination of Wong and Perry, and also of Jow, Griffith and Jones, revealed the background of the line-up and disclosed the setting in which it occurred (see pp. 14-20, above).

Twice the jury heard Pauletich go beyond the questions asked—once, on direct examination to say of petitioner, when brought into the store:

> "He was captured. They got him at the next store that he tried to hold up, I presume" (A. 193).

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petitioner's objections that the diagram should be an authentic map, to afford a true picture of the area (A. 45-46). The exhibit no longer exists, having been removed and destroyed (see fn. 1, above).

—and then, on cross examination into his report of the robber's clothing, to assert:

> "* * * and they [a police officer] said it seemed to fit the description of the two previous robberies that were reported to him" (A. 195).[21]

So too the jury heard Griffith answer nearly all petitioner's questions about the robber in the second person, rather than the third as called for by the questions, and as used by most of the other witnesses (for Griffith's cross examination, see A. 164-177).

Perry, in addition, accused petitioner of "trying to play * * * dumb," in cross examining about the robber (A. 139).

Each of the above persons, with the exception of Slaise, also pointed to petitioner in court, as the robber. But their over-all testimony left room for doubt. Wong, Jow, Perry, Griffith and Jones each acknowledged, of course, that he had already been shown petitioner in person at least once before, by the police—as had Pauletich (see pp. 13-20, above). Jow, Griffith and Jones admitted they had been shown photographs of petitioner shortly before trial (see pp. 23-26, above), and Wong and Pauletich admitted to conflicts in their testimony at trial, as compared to their descriptions of the robber at the preliminary hearing (see p. 22, above).

Perry, who first said he would never forget the robber's eyes (A. 131), could not then recall whether in addition the robber wore any thick or heavy grease on his face, or whether he did not (A. 137-138). Jones, on direct examination, said only that petitioner "looks like him" (the robber)

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[21] The court ordered the jury to disregard the first statement, but not the second (A. 193, 195).

(A. 179), but then changed his testimony on cross examination, and claimed he was positive (A. 180). Slaise, on the other hand, said that he could not describe or identify the man he saw the night of the robbery at all (A. 225).

There was no agreement, from the testimony, on the robber's face:

(i) *scar:*

Wong testified to a scar on the lower part of the cheek and the nose, at the base of the nose, on the left side of the robber's face (A. 75-76). Then he admitted he had testified that the scar was on the other side—the right side—at the preliminary hearing (A. 76-77). And he said he did not remember reporting any scar to the police the night of the robbery (A. 94-96).[22] Jow first said that he did not tell the police about a scar (A. 112-113), but then changed his testimony and said that he did (A. 114). Perry said there was a mark or scar above the left corner of the lip (A. 129). Griffith also said there was a scar, but located it first on the left cheek—right down by the jaw—and then by the lip, by the corner of the nose (A. 166). Later he testified that when shown peti-

[22] When petitioner produced the police report for the robbery and asked Wong if he saw any remarks on it about a scar, the court interrupted before Wong could answer and told petitioner that whether Wong saw a scar in the report or not would be immaterial (A. 97). The court then advised petitioner to talk with the assistant public defender about mentioning the report (A. 97). The record does not show whether such conversation occurred, but thereafter petitioner made no further use of the report in examining Wong (A. 97-98). In fact, the report contained no reference to a scar, or other distinguishing characteristic of the robber (P.X. 9 for identification, A. 37; see also pp. 6-7, above).

tioner's photograph, he did not notice any scars, adding he did not pay any attention whatsoever (A. 173). Jones admitted he saw no scars on the robber's face (A. 180), but claimed he saw one in viewing the photograph, before trial (A. 185). Pauletich said he saw a "mark * * * a scar or a scratch or something" (A. 195), but was not asked to identify on what side of the robber's face it was. None of the witnesses were asked to point to any scars or marks on petitioner's face, as he appeared in court at the time of trial.

(ii) *mustache:*

Wong said the robber had a mustache (A. 90); Jow and Jones, a "little" mustache (A. 113, 180) or a "shade of it" (A. 113). Perry said he only slightly remembered whether the robber at his store had a mustache (A. 131), but that he did not remember reporting a mustache to the police (A. 142, 150). Griffith did not pay any attention to a mustache (A. 171-172, 175), and Pauletich didn't notice any mustache at all (A. 196-197).

(iii) *hair (goatee) along the lower lip:*

Wong said he did not see any hair on the robber's chin or lower lip (A. 90-91). Jow, on the other hand, said there was a "little bit" of whiskers along the bottom lower lip (A. 113). Perry did not remember any hair on the robber's lower lip (A. 134). Griffith said he did not pay any attention to the lower lip (A. 175), and Jones testified he saw neither a goatee on the lower lip, or any beard (A. 180-181). Pauletich said it looked like there may have been hair on the lower lip, but was not sure (A. 197). He did not see

any hair on the lower part of the robber's chin (A. 197).[23]

Likewise, there was no agreement, from the testimony, on the robber's clothing:

(iv) *hat:*

His hat was variously described as: *dark* (Wong, A. 64, 73; Jow, A. 110, 117; Pauletich, A. 205); *brown* (Perry, A. 129, 138; Pauletich, A. 196); *dark brown* (Perry, A. 133); *oxford gray* (Perry, A. 133); and *grayish* (Griffith, A. 165). One witness said it had a "stingy" brim (Perry, A. 133), another implied the brim was turned up all the way around (Jones, A. 179). Pauletich remembered a feather (A. 194), but Perry did not (A. 133). Jones said the hat was "kind of old" (A. 179). Griffith, on the other hand, remembered a rag-looking band around the hat, but noticed little else, because he was afraid (A. 165).

(v) *coat:*

The robber's outer garment was described as: *a sport-type coat* (Wong, A. 56, 63); *a sport coat* (Jow, A. 110; Perry, A. 127; Pauletich, A. 194); *kind of*

[23] The "mug" shots of petitioner, and the line-up photograph, were also in evidence, in addition to the above testimony (D.X. A, A. 91; D.X. B, A. 105-106). The "mug" shots showed a trimmed, clearly defined growth of decorative whiskers under the center of petitioner's lower lip (D.X. A, A. 91). Along with the line-up photograph, they also showed a mustache along the entire length of petitioner's upper lip (D.X. A, A. 91; D.X. B, A. 105-106). The "mug" shots showed what appeared to be a scar on the right cheek of petitioner, and a large, pronounced scar running outward from petitioner's left upper lip. But, as indicated by the conflicting testimony of Jones and Griffin, there may have been difficulties observing the scars in the photographs (A. 173, 185).

a sport coat (Jones, A. 179); *a coat* (Griffith, A. 165); and *sport coat or sport jacket* (Pauletich, A. 203, 210-211). It was said to be a *dark color* (Wong, A. 87); *dark gray* (Jow, A. 117); *lighter than the robber's trousers* (Jones, A. 179); *grayish* (Griffith, A. 165; Pauletich, A. 198); and *gray* (Griffith, A. 165; Pauletich, A. 198). Perry said the coat had a little check pattern (A. 127), but Griffith said it was striped (A. 165).

(vi) *shirt:*

Wong saw a yellow, or kind of yellow, shirt on the robber (A. 64, 70, 81-82, 86). First, he testified it had flowers on it, "[s]ome kind of spots" (A. 82); but then he said it had "a little flower" (A. 86); and finally he admitted he was not positive it had flowers at all—"it happened so fast, you don't recognize it," he said (A. 86). Jow testified to a yellow shirt with some dots on it (A. 117); he said it did not have a flower design, but that it was a flower (A. 117). Griffith could only recall "kind of * * * a yellowish-looking" shirt (A. 166). He did not know whether it had a flower on it (A. 175). Jones did not know what kind of shirt the robber had on, because he got only a slight look at him (A. 181). And Perry didn't remember what the shirt looked like, because he didn't pay attention to it (A. 129). Pauletich, on the other hand, thought the man who robbed his store had on a shirt with a floral pattern, but he did not know what color it was (A. 198). Nor was he entirely sure that it was a flower-type shirt, since he did not think too much of it was exposed (A. 204).

(vii) *trousers:*

No one remembered too much about the robber's pants, except Jones, who indicated they were darker than his coat (A. 179, ~~182~~). Perry was not asked any questions about them. Griffith said he did not pay attention to them, and could not give their color (A. 166). Neither could Wong (A. 87). Neither Wong nor Jow could say what type of trousers they were (A. 86, 120); and Pauletich said he did not notice the trousers at all, and did not think he gave the police any description of them (A. 195).

When the district attorney exhibited a hat, coat and shirt taken from petitioner after his arrest, he did not ask the witnesses whether, in fact, this was worn by the robber. He instead limited his questions to whether there was a resemblance (A. 63-64, 110, 129, 179, 194). He did not show any of the clothing to Griffith or Slaise. He showed only the hat and coat (but not the shirt) to Perry, Jones and Pauletich (A. 129, 179, 194). Wong and Jow saw all three (A. 63-64, 110).

Wong said there was a resemblance (A. 63-64). Jow said the coat resembled the one the robber had on, but then volunteered the hat and shirt were the same (A. 110). Perry, who saw the hat and coat, said only that there was a resemblance (A. 129). Jones said the coat looked "something like" the one he saw at the robbery (A. 179)—but later changed this testimony, saying that the clothes worn by petitioner in the line-up were "the same * * * he had on the night of the robbery" (A. 182), and that the line-up coat looked "just like" the one shown at trial (A. 183). Pauletich took the opposite course. At first he testified

that the hat and coat resembled those worn by the robber (A. 194), and that petitioner was wearing the same hat and coat when brought into the store by the police, as when the store was robbed (A. 194, 201, 205). But then he refused to say whether the hat he saw in court could be deemed a shade of brown (A. 205), which was the color of the hat he testified he saw on the robber (A. 196, 205).[24]

(c) *Closing Testimony and Exhibits*:

The last two witnesses for the State were Smith, the clerk at the store where petitioner was arrested, and Nielsen, the officer who made the arrest (A. 226, 238). Much of their testimony has been described elsewhere in the brief (see pp. 11-13, above).

Smith said petitioner came into the store shortly before midnight, asked if he owned the store or worked there, and then asked if he had a gun (A. 226-227). The court overruled petitioner's objections to this testimony and held that

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[24] At the outset, petitioner moved to suppress use of his hat, coat and shirt on the ground they had been illegally seized (A. 61). He argued they were taken from him after an illegal arrest, and prior to the time he was brought before a magistrate (A. 62). His argument—somewhat garbled—was that the arrest was illegal, because made without a warrant, and that as long as he was not brought before a magistrate, he was in the status of being illegally arrested (A. 62). He also pointed out that he was not brought before a magistrate until Tuesday, over three days after his arrest (A. 62). The court denied the motion (A. 62-63). Later, at the close of the State's case, petitioner objected to admitting the hat, coat and shirt in evidence, on the grounds they were immaterial to the case, and that there was no testimony that the coat was the one actually worn by the robber (A. 250). The motion was denied (A. 250).

The hat, coat and shirt have been removed from the files of the Superior Court and destroyed by the district attorney's office. They were not available to counsel in preparing this brief. The removal occurred in April, 1966, during the first remand (see fn. 1, above).

it was material (A. 227). Smith then repeated the conversation, adding:

> "And then I told him why did he ask me that, and he told me, 'Well, I might want to hold you up'" (A. 228).

Smith said the police then walked in, that petitioner proceeded to ask for a half pint of whiskey, and that he told the officers he did not like just what petitioner had said (A. 228). Smith testified petitioner was right across the counter from him, and that when he told the officers what petitioner had said, petitioner did not say anything that he could remember (A. 228).

The State next asked Smith if he heard any conversation about a gun at that time (A. 228). But instead of answering the question, Smith replied:

> "Well, I told the officers what he had said, *and he told me that some places had been held up, and he told Mr. Banks, 'Buddy, you fit the description,'* and he began to search him" (emphasis added) (A. 228).

After this, Smith said he could not recall petitioner saying anything about a gun (A. 228). Later he testified that he could not remember whether petitioner had either of his hands in his pocket, when he came into the store (A. 229).

Cross examination showed that petitioner had been in the store three to five minutes before the police arrived (A. 230); that he had not made any attempt to rob Smith (A. 230); that when the police asked where he got the money in his pocket, he said he worked for it (A. 231-232); and that Smith did not see any gun on petitioner (A. 232).

The court, on its own motion, returned to the accusation by the police officer, and in the presence of the jury pressed Smith for details (A. 232-233). Twice it repeated the accusation—once as "There has been some robberies, and you fit the description"—and next as, "Some robberies had been committed and you fit the description" (A. 233). It then asked what petitioner had said, and what he had done, and twice Smith said, "nothing" (A. 233). "Nothing," the court repeated, "all right" (A. 233).

Under questioning by petitioner, Smith testified again that he heard petitioner say he worked for his money (A. 233). Smith said he did not remember petitioner asking the officer what robbery he was referring to or talking about, or where or whom did he rob (A. 233-234). He volunteered that it stood out in his mind that petitioner did not say anything (A. 234). Then Smith admitted once more that petitioner had been in his store for about five minutes before the police came in, that a woman had been killed in the store some time earlier, and said that he did not deny telling petitioner about this that night (A. 234).[25]

Nielsen, the last witness, testified in part to arresting petitioner, searching for a gun, and to *"recover[ing]"* money out of the breast pocket of his shirt and later, at the police station, out of his pants pockets and wallet (A. 239-

[25] Petitioner moved to strike all of Smith's testimony on the ground Smith had not connected him with any of the offenses charged (A. 237). But the court denied the motion (A. 238). It ruled that Smith had connected petitioner on one thing, if nothing else, namely the "adoptive admission" (A. 237). This referred to petitioner's silence in response to the accusation described by Smith (A. 228, 232-233).

There was no charge, however, that petitioner had actually robbed, or attempted to rob, Smith, or that petitioner had engaged in any unlawful conduct on the premises (A. 1-3).

241). He said the money was in denominations of $10's, $5's and $1's, and that with the exception of the money in the wallet, the rest was loose and crumpled (A. 241). But he did not specify how much money was in his pockets, as compared to the wallet (A. 239-241).[26]

He said that at the time he went into Smith's liquor store, he had received reports on the radio about robberies (A. 241). He did not relate the contents of the reports (A. 241).

Finally, he said that he had an oral conversation with petitioner at the police station, which one other officer might have heard (A. 241-242). He said the conversation had not been reduced to writing in any fashion (A. 242; see also A. 243). He described the statement made by petitioner as free and voluntary (A. 242, 244), and acknowledged that it was "in relation to the incidents of that night" (A. 244). He said:

> "My interest was in the possibility of a gun. I asked Mr. Banks, I said, 'What did you do with the gun, Fred,' and Mr. Banks answered that by saying, 'I didn't have a gun.' He said, 'If I had one, I would probably have killed somebody tonight.' He said, 'Guns make me very nervous'" (A. 244).[27]

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[26] Nielsen said he counted 31-one dollar bills among the other denominations he found on petitioner (A. 241). He found no 20's (A. 241, 248). Pauletich had earlier testified the robber took somewhere between 30 and 40-one dollar bills—but Pauletich also said the robber took bills in denominations of 20's (A. 194).

[27] Petitioner objected to this testimony, on the grounds that there was no actual proof he made any statement, that he did not see any copy of the statement, and that he did not know what statement the officer was talking about (A. 242-243). This objection was overruled (A. 243). So was a later objection by petitioner—somewhat

Cross examination showed, among other things, that at the time petitioner was arrested, he told Nielsen that he lived in Pittsburg, and that if he called to Pittsburg he could verify the statement by petitioner as to where he got the money that was in his pockets, but that the officer did not investigate along that line (A. 248). Nielsen said he recalled petitioner saying that he had gotten paid recently, and also a statement by petitioner that he didn't rob anybody at any time either (A. 247-248).

After Officer Nielsen's testimony, the State offered miscellaneous exhibits in evidence—including the hat, coat and shirt taken from defendant—and then rested (A. 249-250).

2. *Defendant's Case*

Defendant opened his defense by stating to the jury that he was an out-of-town resident, that he lived alone in Pittsburg (California), and that he would prove that this was a case of mistaken identity—"mistaken identity made or raised either from unconscience ignorance, forgetfulness and misplace of confidence" (A. 250)—and that the mistaken identity was encouraged by the police and the State's attorney (A. 250).

He said that he worked and that he earned the money which was taken from him (A. 250).

He concluded by saying that the State had left so much out that it would have proved his innocence if all the facts

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garbled—that the officer would not agree with him on whether he, or the officer, said something about a constitutional right involving a statement (A. 243). The court said the fact the officer was not going to agree with defendant was "hardly an objection," and that if defendant was saying the officer didn't inform him of the constitutional right, that was not required (A. 243-244).

would have been in, and that he would not then have to put on a witness or a defense (A. 251).

As his first witnesses, defendant called four different persons who lived in Pittsburg. They testified they had paid defendant various sums for plumbing and other work shortly before the time of his arrest (A. 251-258). These sums totaled approximately $198 (A. 251, 254, 258).

One of the witnesses (Pollard) said that he had known defendant to carry as much as $150 to $200 on his person, and that the day before defendant was arrested, he saw him with as much as $150 in his possession (A. 255). He added that he had paid the defendant for work two days prior to the arrest, and that it was "kind of amazing" that defendant was picked up (A. 256). The last comment, however, was stricken (A. 257).

Defendant next called the police officer who investigated the attempted robbery of Wong (count one) and the robbery of Pauletich (count three) (A. 258-262).

As to Wong, the officer testified that the "Reporting Party" had said he pulled a gun and struck the robber on the hand *or arm*" (casting doubt on Wong's assertions that he had brought his .38 down on the robber's hand; see pp. 5-6, 19-20, above) (A. 260). He did not recall if the "Reporting Party" said the robber had a mustache, but he said he did not write down a mustache in his report (casting doubt on Wong's testimony that he saw a mustache; see p. 34, above) (A. 260).

As to Pauletich, the officer testified that the "Reporting Party" estimated the loss at $175 to $200 (contradicting Pauletich's testimony that the loss was about $165; see p. 11, above) (A. 261-262).

Defendant then called the officer who investigated the robbery of Perry (count two) (Tr. 531, 536). But this officer did not appear (Tr. 531).[28]

The court later read a stipulation that if the officer had appeared, he would have testified that he was one of the officers investigating the robbery of Perry (count two); that he interviewed the reporting party; and that the reporting party informed him "that the suspect got a little better than 70 to $80.00" (A. 262).

Defendant then announced that he rested his case (A. 263).

The court immediately called the assistant public defender, the defendant and the district attorney to the bench, where in view of the jury there was an off-the-record discussion (A. 263). The clerk's transcript states that the court explained to defendant that he had a right to testify in his own behalf if he desired to do so, and that if he failed to testify, the judge had a duty in his in-

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[28] The defendant advised the court that the officer had been subpoenaed (Tr. 532; see also A. 212-214). He added that he could not tell whether service had been obtained, because he was confined in jail (Tr. 532).

The Sheriff's Department received the subpoena on Friday, noon, for the officer to testify on Monday (Tr. 534). It made no effort to obtain personal service, but instead left only a copy of the subpoena with a police patrol sergeant (Tr. 534; Clerk's Transcript on Appeal, p. 34). On Monday, the sergeant said the officer was on vacation and would not be back for two weeks (Tr. 534).

Defendant asked for a continuance to see if the officer could be located (Tr. 538). He said that actual testimony, as compared to proposed stipulated testimony, would have greater impact on the jury (Tr. 537-538, 539, 540-541), and that the police department might know where the officer was vacationing (Tr. 540). The court denied the continuance, accused defendant of being "negligent" for not subpoenaing the officer earlier, and ordered him to accept stipulated testimony, or none at all (Tr. 540-542).

structions to comment to the jury on the failure of defendant to so testify (Clerk's Transcript on Appeal, p. 31). It then shows the defendant elected not to testify (*ibid.*).

Following this discussion, the court recognized the district attorney for his opening argument (A. 263).

B. Arguments to the Jury

1. *Opening Argument*

The opening argument lasted about 22 minutes (Clerk's Transcript on Appeal, p. 31). The district attorney reviewed the events at the three liquor stores, pointing out that in each case the robber had his hand in his right coat pocket, and that Wong, Jow, Perry, Griffith, Jones and Pauletich all testified or identified defendant as the man (A. 264-267).

He pointed to the identification by Pauletich when defendant was brought into the liquor store about half an hour later by the police officer; to the testimony of Slaise that he saw a man come out of Pauletich's store and go down the street, and that Slaise then saw a car pull away and after that didn't see the man any more (A. 267).

He pointed to the circumstances of the arrest; to Smith's statements that defendant asked if he had a gun and then said he just might want to hold Smith up; to the search at the liquor store; and to testimony by Smith that he saw money in different pockets (A. 267-268).

He pointed to Smith's testimony that the officer made a statement, "You look like a suspect in some other robberies," and that the defendant had made no reply (A. 268).

He then said that the main issue, as all the jurors could recognize, was one of identification (A. 268). He added that he did not think there was any question about whether the robberies actually occurred (A. 268). Repeating himself, he stated:

> "The real issue is one of 'Was the Defendant here, Fred Banks, the person who committed those three offenses that he is charged with?'" (A. 268).

Next, in any identification he said:

> "* * * there is a question for the jury to decide as to how good the identification is. There are many factors in identification which may tend to improve the faults of the identification or to make it less good" (A. 268).

From there the district attorney went on to discuss the various factors the jury could consider (A. 268-271). He said there was good opportunity to observe the person at the time of the crimes (A. 268); that short distances were involved (A. 269); that a number of witnesses identified defendant (A. 269); that five of the witnesses, including the two Chinese persons, all testified they identified defendant at the line-up (A. 269) (a misstatement of the evidence; see p. 18, above); that defendant was arrested and "brought back" within half an hour to the liquor store where he was identified by Pauletich (A. 269); and that this was not a situation where before the line-up, at which the witnesses identified defendant, they saw any pictures (A. 269).

He said that another factor to support the identification was the similarity of operation in each of the three offenses;

that in each the person committing the offense had his right hand in his coat pocket; that in each there was testimony he had a sport coat and dark colored hat on; that all offenses happened in a short time, in the same area, as the jury could see from the diagram; that the defendant was arrested within a few blocks, as the jury could see from the diagram, from the three offenses with which he was charged (A. 270).

He next referred to the testimony of the arresting officer as to the denominations taken from defendant, the $176 on his person, and the 31 one-dollar bills (A. 270). He said the officer testified that this money was taken from various pockets of defendant (adding, "I think he described both pants pockets, a shirt pocket, and a wallet" (A. 270)) and suggested to the jury that it was "quite unusual for a person to have that quantity of money distributed around in different pockets, crumpled up, as described by Nielsen" (A. 270) (a distortion of the testimony, since it implied that all or most of the money was in the pockets; see p. 41, above). He then asked the jury to recall the testimony of Pauletich, who said part of the money taken included "about thirty-some-odd" one-dollar bills (A. 270).

And finally, he said:

> "Now, another factor which I think you can consider in a case of this kind is the failure of the person charged to take the witness stand and testify in his own behalf.
>
> "I think you will be instructed on that by the Court, and I think the instruction is to the effect that if a person does not see fit, which he, of course, does not have to do, to take the witness stand to deny evidence

> that has been presented against him, that you, as the jury, may consider that that evidence may—you can take that failure to testify as indicating that the Defendant would be unable to deny it.
>
> "Well, at any rate, the instruction will be given to you on the person's failure to take the witness stand, and you will, I am sure, understand it and be able to apply that to this particular case" (A. 271);

and then immediately concluded:

> "Well, ladies and gentlemen, that is the evidence in this case. I submit that the evidence proves beyond any reasonable doubt that the Defendant in this case is guilty of the three offenses with which he is charged" (A. 271).

The court thereafter recessed for the day (A. 271).

2. *Defendant's Argument*

Defendant's argument the next morning lasted a little over an hour (Clerk's Transcript on Appeal, p. 32) (A. 272-292).

He said he did not know the person who robbed Wong (A. 273).

He said Wong described the robber as 5'6", 150-160 lbs., whereas defendant was 5'10½", 180 lbs.—but the court ordered this comment stricken on the ground there had been no evidence of defendant's size and weight (A. 275).

He also said he wasn't there, at Wong's robbery, so that all he could do was cross examine and attempt to find discrepancies (A. 277).

He argued, in general, that Wong, Perry, and Pauletich had been impeached, and could not be believed. Various inconsistencies in their testimony were cited (Wong: A. 273-277; Perry: A. 277-280; Pauletich: A. 282-284).

He argued that Jow had a motive for supporting Wong, because Jow was employed by Wong (A. 276).

He pointed out that the State had taken steps to make sure Wong and Jow would be able to identify defendant; first, by showing Jow a photograph before trial; second, by seating Wong and Jow in the courtroom during selection of the jury, where they could see defendant (A. 276).

He referred to inconsistencies between the descriptions of the robber given in court, and the descriptions actually reported to the investigating officers, at the time of the offenses (Wong and Jow: A. 275; Perry: A. 279; Pauletich: A. 283-284).

He referred to inconsistencies between testimony at trial, and testimony at the preliminary hearing (Wong: A. 273, 275-276; Perry: A. 277, 279; Pauletich: A. 282-283).

He asked why the State had shown photographs to Griffith and Jones (A. 280-281), and why Mrs. Pauletich, who handed over the money at one of the robberies, had not been called to testify (A. 281-282).

He referred to other cases of mistaken identification (A. 285).

He discussed his conduct in the liquor store where arrested—pointing out that the robber had not stopped to make conversation or to ask anyone if he had a gun (A. 285-287).

Again he referred to the showing of photographs to witnesses shortly before trial, and also clothing, and again asked why this had been done (A. 288).

And then, on the crucial issue here presented—the comment on his failure to take the stand—he said:

> "Ladies and gentlemen, the State's Attorney commented on why the defendant in this case failed to take the stand.
>
> "One reason I didn't take the stand, ladies and gentlemen, is that I didn't believe the State had proven its case.
>
> "It hadn't introduced any evidence here to show that the defendant was the robber suspect, was the guy running around robbing those people. They haven't produced any evidence.
>
> "They produced evidence that he looks like the man, he is similar, those clothes are similar. That is all the evidence they produced" (A. 288).

Shortly thereafter he concluded his argument (A. 288-292).

But three times, referring to the evidence, he lapsed into statements of matters within his personal knowledge, and three times the court ruled in the presence of the jury there was no evidence of such facts, because he had not testified (A. 289-290, 290-291; cf. A. 291).

He discussed finally the wages paid him, and argued that he made good money, that he did not have to rob anyone, and that he had an honest profession, as a plumber (A. 291). Why should he rob anyone, he asked, when

only one or two days' work would produce a hundred dollars (A. 291).

Then, summing up, he referred again to inconsistencies in the testimony (A. 292), to the common experience of mistaking one person for another on the street (A. 292), and concluded:

> "So that is all I can say in this particular case, that I didn't rob anyone" (A. 292).

But again there was an objection that defendant was testifying, and again the court agreed (A. 292). So defendant rephrased his conclusion, to tell the jury:

> "So, ladies and gentlemen, after hearing all of the evidence, I don't understand how you could arrive at any other verdict after the State has failed to prove its case but to bring in a verdict in favor of the defendant, that he is innocent" (A. 292).

3. *The Closing Argument*

Closing argument followed immediately (A. 293-301). It lasted about 20 minutes (Clerk's Transcript on Appeal, p. 32).

The district attorney argued that discrepancies in the testimony were minor and that the jury could not expect the witnesses to give exactly the same descriptions (A. 293-294).

As to coaching the witnesses to identify defendant, he argued that six witnesses made positive identifications at trial; that the manner in which the line-up identification was made, the day after the arrest, was important, because

there was no evidence that any of the witnesses were shown photographs beforehand; and that as to showing photographs afterwards, it was just "normal procedure" for any attorney to want to talk with his witnesses (A. 294-295).

He said the jury could not expect a positive identification of the robber's clothing (A. 295); also, that it was immaterial some of the police reports did not list a mustache or scar, because there was no evidence the officer had asked about them (A. 295-296).

As to Mrs. Pauletich, he said defendant could have called her, if he wanted to (A. 296).

Returning to the line-up, he argued the officer had told the witnesses not to talk when they came up to the window, that each made an identification by himself, and that there was no evidence any witnesses encouraged another to identify defendant (A. 296).

And then, as to defendant's statement there was no evidence to show he was the robber, he again argued that six persons had identified defendant, adding that several recalled seeing a scar on the left side of his face—and that the witnesses also said the clothing worn by the robber looked like the clothing shown in court (A. 297).

He went on to argue that in addition to the eye-witness identification, or direct evidence, there was also a considerable amount of circumstantial evidence in the case (A. 297). He said there was some circumstantial evidence he wanted "to particularly point out" (A. 298).

First, he referred to the manner of the person committing the crimes (A. 298). He said that two witnesses had described the robber as very "cool"; that one witness had

said, "cool, just like you are right now"; and then argued that he was sure the jury, from its own observations, could likewise see that defendant was "cool" (A. 298).

Next, he referred to the manner in which the crimes were committed (A. 298). He said that in each one the robber had his right hand in his coat pocket, simulating a gun, and that this tended to show the same person had committed all three (A. 298). He argued that even if one identification was not very good, the jury could infer the same person committed the offense, if the others were committed in exactly the same way (A. 298).

Next, he referred to the accusatory statements made in defendant's presence (A. 298). He said that when such statements were not immediately denied, the inference was an admission of guilt (A. 298). He then described the two accusations that defendant was the robber—the one by Perry at the line-up, the other by the police officer at the arrest—and said that defendant had made no reply (A. 299).

Next, he referred to the testimony that the robber took a considerable number of one dollar bills from Pauletich, and that defendant had 31 one-dollar bills in his possession, in different pockets, crumpled up (A. 299). He argued that if a person is found shortly after a robbery with similar denominations of money, crumpled up, that was some circumstantial evidence of the offense (A. 299).

Finally, he referred to defendant's failure to testify, and said:

> "Now, also, the defendant here, as you know, has failed to testify in his own defense.

> "I think you will be instructed on that point that where there is evidence in the case that the defendant can reasonably be expected to deny or explain because of the facts within his knowledge, and he does not testify, the jury can consider that failure as tending to indicate the truth of such evidence, and as indicating that among the various inferences that you could draw from the evidence, those inferences unfavorable to the defendant are the most probable.
>
> "And you have that situation here" (A. 299).

Turning to the money ($198) earned by defendant, he said there was no evidence defendant had that much money in his possession at the time of his arrest, or that the money he had was the same (A. 300).

> "Actually," he said, "this happened right around the first of the month, *and we don't know exactly what defendant's circumstances are because he hasn't testified before you*" (emphasis added) (A. 300).

He argued the jury could not know "but what" defendant might have paid various bills with the money (A. 300).

Last, as to motive, he argued:

> "He says why should he have to rob. *Well, that is a question you could ask of many persons who commit robberies,* who might very well be employed but still commit them" (emphasis added) (A. 300),

and then concluded:

> "Well, ladies and gentlemen, that is the substance of the evidence in this case" (A. 300).

Briefly, he went on to say that proof beyond a reasonable doubt did not mean proof to the exclusion of any possible doubt or to a mathematical certainty, but only that the evidence must convince the minds of the jurors and satisfy their consciences (A. 300). He ended:

> "At any rate, I ask you when you consider this case to consider all the evidence very carefully, and *I don't think you should consider any particular piece of evidence in an isolated fashion, but you should consider all of the evidence together*" (emphasis added) (A. 301).

C. Instructions to the Jury

Immediately thereafter the court gave its instructions to the jury (A. 301-313). It instructed on both direct and circumstantial evidence (A. 303-304); included, in addition, were the following:

1. *Admissions by Silence*

> "If you should find from the evidence that there was an occasion when the defendant, under circumstances which fairly afforded him an opportunity to reply, *failed to make denial in the face of an accusation expressed directly to him or in his presence charging him with a crime for which he is now on trial or tending to connect him with its commission,* and if you should find that he heard the accusation and understood its nature, *the circumstance of his silence and conduct may be considered against him as indicating an admission that the accusation thus made was true.*
>
> "Evidence of such an accusatory statement is not received for the purpose of receiving the truth but only to explain the conduct of the accused in the face of it.

"Unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement" (emphasis added) (A. 305).

2. *Failure to Testify*

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision.

"As to any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

"In this connection, however, it should be noted that if a defendant does not have the knowledge that would be needed to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence.

"The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt" (emphasis added) (A. 308-309).

Also included—without support in the record—were (i) instructions that evidence had been offered to show defendant had committed a crime other than the ones for which he was on trial, but which could be considered in determining his guilt or innocence (A. 308) and (ii) instructions on armed robbery and robbery by torture (A. 310).

After deliberating for about an hour and fifty minutes, the jury returned a verdict of guilty on all three counts (Clerk's Transcript on Appeal, p. 32) (A. 313-314).

The Appeal

Petitioner filed a timely notice of appeal, and about two months later counsel was appointed (A. 315). A little over a year and a quarter went by before counsel filed a brief (eleven months after the expiration of his last extension) (A. 316). Argument was had, and two days later the Court of Appeal filed an eight-page typewritten opinion, affirming the conviction (A. 317).

Counsel the next day wrote petitioner a letter, withdrawing from the case (A. 323).

When the case was remanded to the Court of Appeal for further proceedings in light of *Griffin* v. *California,* petitioner requested appointment of counsel to aid in preparing a brief (A. 327). He pointed out that original counsel had failed to see any constitutional errors, and asked for someone else (A. 327). He also asked for permission to appear and argue his case, if counsel were not appointed (A. 327-328). The court denied both requests (A. 329). It stated that original counsel still represented petitioner, that no different attorney would be appointed, and that if either petitioner or original counsel wished to submit some further written argument, they could do so (A. 329).

Petitioner thereafter prepared and filed a brief, in *pro per*. The State submitted a page and a half letter, asserting that the evidence was overwhelming and that petitioner had failed to make any factual argument to support his contention of a miscarriage of justice (A. 331). About a week later, the Court of Appeal filed a three-page opinion, again affirming the conviction (A. 332). No oral argument was heard.

When the case was remanded a second time, for further consideration in light of *Chapman* v. *California*, petitioner again requested appointment of counsel, or the right to appear in person to participate in oral argument (A. 335). Again requests were denied, for the same reasons as before (A. 337).

Petitioner then submitted a brief in *pro per*, but repeated once more his requests for counsel, or the right to come from prison and argue his case (A. 338). Both were again denied (A. 338). Shortly afterwards, the State submitted a one-page letter, reasserting the position it had urged on the first remand (A. 339). About two months later, the case was taken under submission; the same day, the Court of Appeal filed a brief two-page opinion again affirming the conviction (A. 341). It did this, as before, without having heard argument.

The opinion said that the Court had thoroughly reviewed and considered the record in affirming on the first remand, and that it had given further consideration to the cause in light of *Chapman* v. *California*. Without further discussion, the Court then incorporated by reference its original 1964 opinion and declared a belief, based upon "conclusive evidence" of guilt, that comment and instruction on

petitioner's failure to testify were harmless beyond a reasonable doubt (A. 341-342).

No mention was made that the court had never seen the trial exhibits, nor indeed was this any longer possible, since all trial exhibits had been removed from the files of the Superior Court during the first remand, and later destroyed in part by the district attorney (see fn. 1, p. 7, and fn. 24, p. 38, above).

ARGUMENT

Summary and Introduction

The comment and instruction on petitioner's failure to testify were error (*Griffin* v. *California* (1965) 380 U.S. 609). The question is whether—on this record—the District Court of Appeal could reasonably declare a belief that the error was harmless, beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U.S. 18).

The Court of Appeal based its decision on the "conclusive evidence" of guilt (A. 342). It did not find that comment by the prosecutor was insignificant, nor could it in view of the emphasis placed upon the failure to testify during argument to the jury.

The basic issue, on all three counts, was whether petitioner was the robber. The evidence, both circumstantial and direct, was far from conclusive. First, there were numerous conflicts in the eyewitness descriptions of the robber. Second, there was testimony that a number of witnesses had been shown photographs of petitioner shortly before trial, in an apparent attempt to bolster their in-court identification. Third, there was substantial question how

far the in-court identifications rested upon independent recollections of the robber, as he appeared at the various stores, in contrast with recollections of petitioner as he appeared in the line-up or at the separate exhibition to Pauletich the night of the robbery. Fourth, there was the simple fact that petitioner had on his person only $176 at the time of his arrest, whereas the robber had obtained a total of $235-265 almost immediately before.

Other evidence indicated petitioner's innocence. There was testimony that he was gainfully employed. Several persons stated they had paid him an aggregate of about $198 in wages within a few days prior to the arrest. Also, the last robbery netted money in denominations of $20's; yet no $20's were found on petitioner.

Indeed, had the evidence in fact been conclusive, it is unlikely the prosecutor or the police would have found it expedient to show photographs of petitioner to witnesses before trial, or that the prosecutor would have elected to comment on petitioner's failure to testify on at least three different occasions during argument to the jury.

Separate and apart from comment on petitioner's failure to testify, it was error to use petitioner's silence in the face of accusations as an admission of guilt. Such accusations were not mere harmless statements, but assertions that petitioner was the robber. One was made by a police officer at the arrest, another at the line-up while petitioner was in custody and under police control. Use of petitioner's silence as evidence of guilt imposed a severe penalty on the exercise of his rights under the Fifth Amendment (*Griffin* v. *California* (1965) 380 U.S. 609, 614-615; see also *Miranda* v. *Arizona* (1966) 384 U.S. 436, 468, fn. 37). It

allowed a conviction on proof of accusations, rather than on hard-core evidence of guilt—and for all practical purposes shifted the burden of proof.

Further, the identification procedures used by the prosecutor and the police outside court were pregnant with suggestion, and made it impossible for petitioner to have a fair trial. The circumstances did not require an individual confrontation with Pauletich (cf. *Stovall* v. *Denno* (1967) 388 U.S. 293). Nor was it consistent with due process to place petitioner in a line-up where he was the only one dressed in both a hat and coat like the robber (see *United States* v. *Wade* (1967) 388 U.S. 218, 232-233). No counsel was present to represent petitioner at these crucial stages or otherwise protect his interests. Moreover, showing photographs of petitioner to witnesses later made meaningful cross examination into their independent recollections difficult, if not impossible (see *United States* v. *Wade* (1967) 388 U.S. 218, 223-234, 235-236).

Finally, the record demonstrates that petitioner was denied the right to counsel, both at trial and on appeal following the two remands. The circumstances of these denials are discussed below (see pp. 96-108).

A.

It Was Error to Rule That Comment and Instruction on Petitioner's Failure to Testify Were Harmless Beyond a Reasonable Doubt.

Comment and instruction on petitioner's failure to testify were error (*Griffin* v. *California* (1965) 380 U.S. 609). The case was pending in this Court when *Griffin* v.

California was decided, so the error is properly in issue (*O'Connor* v. *Ohio* (1966) 385 U.S. 92). The question now is whether the State has met its burden of proving beyond a reasonable doubt that the erroneous comment and instruction did not contribute to petitioner's conviction (*Chapman* v. *California* (1967) 386 U.S. 18, 24, 25-26).

We set to one side how this issue can ever be completely resolved in the present circumstances, where the district attorney's office has removed from the files of the trial court and destroyed the clothing shown to the jury, as well as the rough diagram of the streets in West Oakland which, directly or indirectly, suggested to the jury the relative distances between the various offenses and the scene of petitioner's arrest.

We also put to one side the question of how the court below could properly have decided the harmless error issue against petitioner, when on both remands it refused to hear argument on his behalf or even to appoint counsel to marshal the facts in a brief.

What emerges from the record is that it is impossible to say—beyond a reasonable doubt—that the comments and instructions on petitioner's failure to testify did not contribute to petitioner's conviction.

The basic issue was whether petitioner was the robber. He could not take the stand to deny the charges, without risking that his prior convictions, years before, would be used for impeachment and perhaps prejudice the jury (*Griffin* v. *California* (1965) 380 U.S. 609, 614-615). His defense was that the State had failed to prove its case, and also that the money found on his person had been earned, not stolen.

The prosecutor used the comment against petitioner in two ways. First, to support an overall inference of guilt, because he had not testified. Second, to attack petitioner's defense that he had earned his money. The prosecutor suggested that part of the sums earned may have gone to pay bills. He said that the jury could not know about this, because petitioner had failed to testify (see p. 54, above).

The comment played a prominent role in both opening and closing argument. It was the final point made in opening argument (see pp. 47-48, above). It was made twice at the end of closing argument (see pp. 53-54, above).

The failure to testify was very much before the jury, because of the court's admonitions to petitioner during his argument, warning him not to testify by discussing matters not in evidence. Even petitioner's concluding sentence, that he was not the robber, was attacked as testifying (see p. 51, above).

Further, the prosecutor relied heavily on circumstantial evidence to obtain a conviction (cf. *Fontaine* v. *California* (1968) 390 U.S. 593). The last portion of his closing argument was devoted almost entirely to a discussion of the various inferences pointing to petitioner as the robber. And in his concluding sentences he urged the jury to take all this evidence, both circumstantial and direct, into consideration in reaching a verdict (see p. 55, above).

The trial court instructed on both direct and circumstantial evidence, and likewise told the jury that it could consider all the evidence together, not just parts of it (A. 303-304). The court specifically instructed the jury that it could draw adverse inferences from petitioner's failure to testify (see p. 56, above). It coupled these instructions

with others on adverse inferences to be drawn from petitioner's failure to deny the accusations made against him, at the arrest and later at the line-up (see pp. 55-56, above). In both sets of instructions, silence was equated with guilt.

Who knows on what evidence—direct or circumstantial —or on what inferences any one or more of the jurors may have relied?

This was a case where there was latitude for doubt that petitioner was the robber. First, he was accused of three separate offenses, all occurring in different locations. Second, the prosecutor as much as admitted that all the identification testimony might not be convincing, when he argued that proof of *modus operandi* would be sufficient to link petitioner to an offense, even if the identification were not very good (see p. 53, above). But even here, the basic common denominator was merely that the robber had his right hand in his coat pocket at each of the offenses, simulating a gun—hardly a unique trait. Moreover, the clerk at the scene of petitioner's arrest was unable to recall whether petitioner had either of his hands in his coat pocket at the time he came into the store (see p. 39, above). Further, the prosecutor did not deny petitioner's statements during argument to the jury that the descriptions of the robber in the various police reports did not match the actual, physical appearance of petitioner, or even the descriptions given in court (A. 275, 279, 283-284). Instead, the prosecutor attempted to avoid the obvious inferences, by arguing that the investigating officers might not have asked about such things as mustaches or scars (see p. 52, above).

What was the "conclusive evidence" of guilt upon which the court below relied? Was it that Wong and Jow (count

one), Perry, Griffith and Jones (count two), and Pauletich (count three) all pointed to petitioner in court as the robber? Then what about the testimony of Slaise (count three), who could not identify petitioner at all, or anyone else for that matter? And what about the testimony that three of the six persons who made the identification, Jow, Griffith and Jones, had all been shown photographs of petitioner shortly before trial? How could Jow point out petitioner in court three months after the robbery, when he could not make a positive identification the next day at the line-up?

Why did Wong refuse to say for sure whether he saw any swelling on petitioner's right hand, when he examined it at the line-up—though he claimed to have struck the robber on the hand with the barrel of his .38, just the night before (see pp. 19-20, above)?

Wong and Jow both admitted they were excited at the time of the attempted robbery (see p. 6, above). This was the first time anyone had tried to hold them up (see p. 6, above). Of those who were at Perry's liquor store, Griffith said he was "afraid" (A. 165). Jones was more intent on running into the store to buy a bottle before the store closed, than he was on making an identification of the robber (see pp. 8-9, above). Perry, who testified he could never forget the robber's eyes, was unable at the same time to say whether the robber had any thick or heavy grease on his face (see p. 32, above). Moreover, he admitted that he was "hot" about having to go to the line-up, and then having to lose additional pay to come to court and testify (A. 152). As to Pauletich, he acknowledged "a little excitement" when the police brought petitioner into his store about half an hour after the robbery (A. 219). Further, he could not make up his mind about

what kind of clothes the robber was wearing, and did not notice whether the robber had a mustache, nor was he too sure about scars (see pp. 22 (fn. 11), 34, above).

The very fact that the police brought petitioner into Pauletich's store, rather than going directly to the police station, is some indication that the police themselves were not sure, from their reports, whether petitioner was the robber.

Little need be said of the so-called oral admission elicited from petitioner at the police station by the arresting officer (see p. 41, above), to the effect that petitioner said he didn't carry a gun because guns made him nervous, and that if he had one he might have killed someone that night. First, the statement was uncorroborated (see p. 41, above). Second, it had not been reduced to writing in any fashion, even though the testimony of the first witness for the State, the officer who was in charge of the investigation, showed that the police had been very careful to make notes of their conversations with the various witnesses, including a conversation with petitioner (see pp. 29-30, above). Third, the court itself instructed the jury that testimony of any such "admission" must be viewed "with caution" (A. 306). Indeed, why was the officer even questioning petitioner at all along these lines, if he was sure he had his man?

Further, the line-up was conducted in such a manner as to almost compel an identification of petitioner. He was the only person with both a hat and coat like the robber. He was the only one in the age bracket of the robber; all the others were "young guys" (see pp. 15-16, above). He was standing in the middle, where he could not be missed

(see p. 16, above). These are but a few of the suggestive circumstances of the line-up; others will be discussed later in that portion of the brief dealing with the measures used outside of court to obtain an identification (see pp. 82-90, below).

Elsewhere in this brief are set forth the numerous inconsistencies in the testimony concerning the robber's physical appearance and clothing (see pp. 33-38, above). Briefly summarized, the testimony described a robber:

(i) With a scar on the right side of his face, without a scar on the right side; with a scar on the left side variously located on the lower part of the cheek and nose, at the base of the nose—above the left corner of the lip—and right down by the jaw; a robber for whom one witness first said he did not report a scar, but who later changed his testimony and said he did report a scar; and a robber for whom another witness did not remember reporting a scar at all (pp. 33-34);

(ii) With a mustache, and without a mustache (p. 34);

(iii) With other whiskers, and without other whiskers (p. 34);

(iv) With a dark hat, with a brown hat, with a dark brown hat, with an oxford gray hat, and with a grayish hat (p. 35);

(v) With a sport-type coat, sport coat, kind of a sport coat, a coat, and a sport coat or sport jacket. In color, a dark color, dark gray, lighter than the robber's trousers, grayish and gray. One witness said the coat had a little checked pattern, another said it was striped (pp. 35-36);

(vi) With a shirt with flowers; a shirt with a little flower; a shirt with dots; a shirt that was a flower; and a shirt that two witnesses could not recall at all. In color, a yellow, or a kind of yellow shirt, yellowish color shirt, and a shirt whose color one witness did not remember and another witness did not know (p. 36); and

(vii) With trousers that most witnesses could not describe (p. 37).

Elsewhere are also set forth the various inconsistencies in identification testimony at the preliminary hearing, as compared to identification testimony at trial (see pp. 22-23, above). These conflicts, of course, were all before the jury and will not be repeated here.[29]

Petitioner, moreover, would have had to have been moving at a rapid pace to commit one attempted robbery and two actual robberies, at stores blocks apart, all within half an hour or so. Had he committed them it is unlikely that he would have been found with only the odd figure of $176 in his pockets shortly thereafter, as compared to the aggregate of $235-265 taken in the robberies. To be sure, he had

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[29] Even where there are no conflicts in identification testimony, a just result is not guaranteed. See, for example, the observations of Justice Frankfurter:

> "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure" (Frankfurter, The Case of Sacco and Vanzetti (1927), p. 30).

See also Wall, Eye-Witness Identification in Criminal Cases (1965), pages 11-12.

31 one-dollar bills in his possession, and about 30-40 one-dollar bills had been taken from Pauletich. But Pauletich had also lost money in denominations of $20's, and petitioner had no $20's. Further, contrary to the prosecutor's assertions that most or all the money was crumpled up in petitioner's pockets, there was no evidence as to how much money he had carried in his pockets, as compared with his wallet, or in what denominations they were. Petitioner's argument indicated they were probably one-dollar bills, so that he could "fish" a dollar bill out of his pocket when buying drinks, rather than exposing the rest of his money (A. 290).

In short, the evidence was far from conclusive that petitioner was the robber. The Court of Appeal for that reason erred in holding the error harmless (cf. *Chapman* v. *California* (1967) 386 U.S. 18; *Fontaine* v. *California* (1968) 390 U.S. 593).

In any event, how can this Court, or any appellate court, ever say—beyond a reasonable doubt—that comment on the failure to testify was harmless and did not contribute to a conviction? How can it see the reaction of the jurors when the comment was made? How can it know the tone of voice in which the prosecutor spoke of the failure to testify, or the pauses used by him for emphasis, or the emphasis the judge placed upon the comment in reading his instructions?

Further, the harmless error rule assumes that the jury has to believe all the other evidence adduced against an accused, whereas in fact its very purpose is to judge demeanor of the witnesses and their apparent veracity in testifying, and then to reject such testimony as may seem unconvincing or untrue. How can this Court, or any court,

know on appeal if the jury believed little of the direct evidence, and instead relied almost entirely on the inferences, from the failure to testify? The answer is, it cannot.

Moreover, comment always goes to the very heart of the trial—guilt or innocence. It is not a mere procedural error, that can be corrected easily or that is fundamentally irrelevant.

In other cases this Court has been unwilling to speculate on what may or may not have contributed to a conviction, where error of constitutional magnitude was involved (e.g., *Gideon* v. *Wainwright* (1963) 372 U.S. 335 (denial of counsel); *Lynumn* v. *Illinois* (1963) 372 U.S. 528 (involuntary confession); *Haynes* v. *Washington* (1963) 373 U.S. 503 (involuntary confession); and *Tumey* v. *Ohio* (1927) 273 U.S. 510 (financial interest of judge in result)), or even where there was a possibility of influence from outside, improper sources (e.g., *Rideau* v. *Louisiana* (1963) 373 U.S. 723 (admissions on television interview); *Turner* v. *Louisiana* (1965) 379 U.S. 466 (close and continuous association between key witnesses and the jury)).

We do not suggest, however, that petitioner needs a *per se* rule to obtain a reversal on the comment and instructions. The record here shows that it was impossible to declare that the error was harmless, beyond a reasonable doubt, and that the Court of Appeals erred in ruling otherwise. We do suggest, though, that a *per se* rule would not be inappropriate in *Griffin*-type comment cases, because of the inherent difficulty in saying in any circumstances that comment did not contribute to a conviction.

If the comment was unimportant, why did the prosecutor make it?

B.

It Was Error to Use Petitioner's Silence in the Face of Accusations by a Police Officer at the Arrest, and Later by a Viewer at the Line-Up, as "Adoptive Admissions" of Guilt.

Immediately before petitioner was arrested, the arresting officer said to the clerk on duty in the liquor store that there had been some robberies (A. 228). He then said to petitioner, "Buddy, you fit the description," and began to search him (A. 228, 233). Petitioner remained silent (A. 228, 233). This silence was used against petitioner at trial as an "adoptive admission" of guilt (A. 237-238, 298-299).

While petitioner was in custody, at the line-up, a police inspector took one of the viewers out into the line-up corridor, so that the viewer could point to the man he had picked out (A. 131-132). The viewer was Perry, the clerk at the second liquor store (count two). He testified that he went up to petitioner and said, "that was the man that held me up" (A. 132). He testified that petitioner remained silent (A. 132). The accusation was made in the immediate presence of the police inspector (A. 131-132). Here too, silence was used at trial as an "adoptive admission" of guilt (A. 298-299).

The State elicited testimony of both accusations during its case in chief. Each time the court asked a number of questions about petitioner's conduct, to establish that he had in fact heard the accusations and remained silent (A. 131-132, 228, 232-233).

During closing argument, the prosecutor referred specifically to the accusations and described them in detail

(A. 298-299). He said that petitioners' silence was circumstantial evidence of guilt, which the jury could consider in reaching a verdict (A. 298-299). These comments were made near the end of his closing argument, as one of his final points (A. 298-299). Shortly thereafter, the court gave instructions on "adoptive admissions." It told the jury, in effect, that silence in the face of accusations was proof of guilt (see pp. 55-56, above).

On appeal, the court below rejected the argument that petitioner might well have failed to deny the arresting officer's accusations out of fear of his authority, or out of ignorance of the robberies. It said these contentions were entirely without merit, and held that the instructions on admissions by silence were proper (A. 231).

While this case was pending here on the initial petition for certiorari, and before the first remand, the California Supreme Court held in two other cases that use of such admissions as evidence of guilt was proscribed by the rationale of *Griffin* v. *California* (1965) 380 U.S. 609, as a violation of the Fifth Amendment privilege against self-incrimination (*People* v. *Cockrell* (1965) 63 Cal.2d 659, 669-670, certiorari denied (1967) 389 U.S. 1006; *People* v. *Ridley* (1965) 63 Cal.2d 671, 673, 674-676). However, it applied a harmless error rule to comment and instruction on such admissions, in one case holding the error harmless in view of the "abundant evidence" of guilt (*People* v. *Cockrell* (1965) 63 Cal.2d 659, 671, certiorari denied (1967) 389 U.S. 1006), in another harmful (*People* v. *Ridley* (1965) 63 Cal.2d 671, 676-677).

The use of adoptive admissions was raised by petitioner in this Court on his initial petition for certiorari (Motion for Leave to File a Reply to Respondent Petition in Opposition to Petitioner Petition for a Writ of Certiorari, p. 2)

and was before the Court when it remanded the case the first time to the District Court of Appeal for further proceedings in light of *Griffin* v. *California*. On remand, however, the Court of Appeal did not discuss the admissions, though presumably it knew of the opinions of the California Supreme Court in *Cockrell* and *Ridley*. Instead, the court below said that its first opinion set forth its reasons for rejecting the various claims of error raised by petitioner, and that no valid reason had been advanced to bring it to a different conclusion. It adopted its prior opinion in full. As to the comment and instruction on failure to testify, it held that the error was harmless because of the "abundant evidence" of petitioner's guilt, noting that there had been identifications by six eyewitnesses and asserting that petitioner had "produced no evidence contradictory of the eyewitnesses' testimony" (A. 333). The court, by summarily incorporating its prior opinion, ruled in effect that *Griffin* did not extend to the use of adoptive admissions in this case, or, if it did, the error in using adoptive admissions as evidence of guilt was harmless, within the harmless error standard then prevailing.

When this Court remanded a second time, for reconsideration of the finding of harmless error in light of *Chapman* v. *California* (1967) 386 U.S. 18, the District Court of Appeal said that it had thoroughly reviewed and considered the record on the first remand, on *Griffin*. It said that it had given further consideration to the cause in light of *Chapman*, and that it approved and adopted again its first opinion affirming the conviction. As to comment and instruction on the failure to testify, it declared a belief that the error was harmless beyond a reasonable doubt, because of the "conclusive evidence" of guilt (A. 342).

Again it did not mention the adoptive admissions, although they were part of the prior opinion which it adopted and incorporated by reference. Such treatment of the admissions meant that the court below again concluded either that the use of adoptive admissions in the context of this case was not error, or that the error, if any, was harmless under the new standard of *Chapman.*

When petitioner sought certiorari this last time, he once more raised the question of the propriety of comment and instruction to the jury on admissions by silence (Petitioner Supplement Brief to the Application for a Writ of Certiorari, p. 6). So the issue is now properly before the Court.

Was it error to use petitioner's silence, in the face of accusations, as evidence of guilt?

Griffin v. *California* (1965) 380 U.S. 609 holds that the Fifth Amendment, in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence at trial, or instructions by the court that such silence is evidence of guilt (*id.,* at p. 615).

The same rule should be applied to comment and instruction on the accused's silence before trial, at arrest and while in custody. First, an accused has a privilege to remain silent at these stages (*Malloy* v. *Hogan* (1964) 378 U.S. 1, 8; *Escobedo* v. *Illinois* (1964) 378 U.S. 478, 485). Second, comment and instruction on his silence cut down the privilege, and make its assertion costly (*Griffin* v. *California* (1965) 380 U.S. 609, 614). Third, courts may not impose a penalty upon an accused for exercising a constitutional privilege (*Griffin* v. *California, supra,* at p. 614). For these reasons, it follows that the Fifth Amendment,

made applicable to the States through the Fourteenth Amendment, forbids drawing inferences of guilt from silence in the face of accusatory statements (cf. *Miranda* v. *Arizona* (1966) 384 U.S. 436, 468, fn. 37; see also *McCarthy* v. *United States* (6 Cir. 1928) 25 F.2d 298, 299).

Silence, of course, is an unequivocal exercise of the privilege (*Griffin* v. *California* (1965) 380 U.S. 609; see also *United States* v. *Pearson* (6 Cir. 1965) 344 F.2d 430, 431; *Helton* v. *United States* (5 Cir. 1955) 221 F.2d 338, 342; *People* v. *Cockrell* (1965) 63 Cal.2d 659, 670, certiorari denied (1967) 389 U.S. 1006).

Sound practical reasons suggest themselves for such a rule. First, the accused has no control over the scope or content of the accusation, and unless he wants to waive the privilege cannot limit or explain what he means by his silence. Second, the inference is not one the jury would itself draw from what it observes in court, but is one that is generated outside court by the police or others, perhaps solely because they fear they will be unable to prove their case by direct evidence at trial. Third, silence may occur for a number of reasons unconnected with an admission of guilt. The accused, for example, may be innocent and unable to understand what the accuser is talking about. Or he may be timid or afraid and unable to answer for emotional reasons. Or he may be wary of saying anything at all, lest whatever he says be twisted and used against him (see, e.g., *Helton* v. *United States* (5 Cir. 1955) 221 F.2d 338, 342).

Such rule, forbidding the use of inferences against an accused because of a failure to deny accusations, should be applied in the present case. Here admissions by silence were clearly used against petitioner (see pp. 71-72, above). Further, the accusations were made at a time when the

privilege against self-incrimination had already attached. Use of petitioner's silence as an "adoptive admission" imposed a severe penalty on the exercise of the privilege. It was a penalty the jury could not have missed, because the court and prosecutor repeatedly drove home the making of the accusations and the fact of petitioner's silence (see pp. 71-72, above).

Further, the error requires reversal of the judgment below on all three counts. First, the accusation by the police officer was a reference to a number of robberies, which the jury may well have interpreted to include the attempted robbery of Wong, as well as the robberies of Perry and Pauletich. Second, under the prosecutor's *modus operandi* arguments, the accusation on count two (by Perry) could also have been considered by the jury on counts one and three (A. 270, 298).[30]

Moreover, it cannot be said the error was harmless. It went to identification, the basic issue in the case. Substantial conflicts existed in the identification testimony and in the descriptions of the person or persons who committed the offenses charged to petitioner (see pp. 32-38, above). Further, whatever inferences the jury, on its own, might or might not have drawn from the failure to testify absent comment and instructions (*Griffin* v. *California* (1965) 380 U.S. 609, 614-615), it would not have known

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[30] During closing argument, he said:

"*If you had a case,* for example, *where* you are satisfied that one identification of the person is good identification, *the other identification may not be very good, but you are satisfied that each of the offenses were committed in exactly the same way, you could reasonably make an inference that the same person,* if you are satisfied committed one of the offenses, *committed the other ones, too*" (A. 298).

about the accusations had not the prosecutor deliberately elicited testimony about them. The eliciting of such testimony is some indication, in itself, that the prosecutor believed the "admissions" would assist in obtaining a conviction. Such conduct also indicates the prosecutor may have believed the eye-witness identifications were not entirely persuasive. On the record in this case, it is impossible to declare a belief that comment and instruction on petitioner's silence, in the face of the accusations, were harmless beyond a reasonable doubt (*Chapman* v. *California* (1967) 386 U.S. 18; see also *McCarthy* v. *United States* (6 Cir. 1928) 25 F.2d 298, 299).

In any event, it is legitimate to question the use of a harmless error rule at all in the case of "adoptive admissions." The "admissions" are little more than involuntary confessions (cf. *Bram* v. *United States* (1897) 168 U.S. 532, 562-563; *Boyd* v. *United States* (1886) 116 U.S. 616, 621-622; see also Developments in the Law—Confessions, 79 Harv.L.Rev. 938, 1041-1044 (1966)). They are compelled by the accusation just as surely as if they were compelled by a rubber hose. Harmless error rules have not been applied in the past by this Court to involuntary confessions (e.g., *Jackson* v. *Denno* (1964) 378 U.S. 368, 376; *Haynes* v. *Washington* (1963) 373 U.S. 503, 518-520; *Lynumn* v. *Illinois* (1963) 372 U.S. 528, 536-538). They should not now be applied to involuntary admissions by silence (cf. concurring opinion of Mr. Justice Stewart in *Chapman* v. *California* (1967) 386 U.S. 18, 42-45).

Finally, by using adoptive admissions, the prosecutor is, in fact, shifting the burden of proof. He is proving his case, at least in part, by accusations, rather than by hard-core direct or circumstantial evidence of complicity. He is

placing upon the defendant the burden of explaining his silence, or risking a conviction. The accusation itself becomes the evidence against the accused. But this is contrary to the constitutionally compelled duty of the prosecutor to establish guilt by evidence independently and freely obtained (*Malloy* v. *Hogan* (1964) 378 U.S. 1, 7-8). It permits a conviction not on proof of what was done, but on what the defendant is accused of doing. And, in practicality, denies an accused a fair trial. Like an inquisition, the accused stands condemned by his silence.

C.

The Line-Up and Other Identification Procedures Used by the Police and District Attorney, Outside Court, Were Unduly Suggestive. Separately and Collectively They Denied Petitioner a Fair Trial.

Three separate procedures were used by the police or district attorney, outside of court, to obtain an identification of petitioner. They were:

(1) Showing petitioner singly to Pauletich, in Pauletich's liquor store, the night of the robbery (the show-up);

(2) Showing petitioner in a group to Wong, Jow, Perry, Griffith and Jones at the Oakland jail, the next day (the line-up); and

(3) Showing photographs of petitioner to Jow, Griffith and Jones individually, shortly before trial.

The show-up, the line-up and the showing of photographs, in the circumstances of this case, were unduly suggestive.

(1) The Show-Up

The showing of petitioner singly to Pauletich is described earlier in the brief (see pp. 13-14, above).

Pauletich testified, on direct examination, that he made an identification of petitioner at the show-up. This was admissible in California not only to corroborate the identification made at trial, but as independent evidence of identity (*People* v. *Gould* (1960) 54 Cal.2d 621, 626). Later, one of the prosecutor's principal identification arguments to the jury was that Pauletich had identified petitioner within half an hour after the robbery, at the show-up (A. 269).

The show-up was conducted in an atmosphere of excitement (A. 219). The police in effect told Pauletich that petitioner was the robber, when the two officers walked into the store on either side of petitioner, holding him by the hands (A. 199). The police did not require that Pauletich study petitioner carefully for any period of time; the whole procedure was over in just a moment or so (A. 200). Further, the police did not make petitioner remove his hat and coat, so that Pauletich could not be confused by clothing similar to that worn by the robber (A. 194, 200-201, 219).

The show-up epitomized almost every feature that has led to the near universal condemnation of such procedures as an unduly suggestive and near totally prejudicial means of producing an identification (Frankfurter, The Case of Sacco and Vanzetti (1927) pp. 31-32; Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 27-40; see also *Stovall* v. *Denno* (1967) 388 U.S. 293, 302). It showed petitioner, a man of a different race, to Pauletich late at night under circumstances that offered Pauletich no alternative choices, by which he could test his independent

recollection. Had Pauletich any emotional reaction to the robbery shortly before, he would have been predisposed to believe the worst of the person brought before him as the probable offender (Borchard, Convicting the Innocent (1932) p. 84). Moreover, the show-up was a wholly unnecessary procedure, since Pauletich was not incapacitated in any way, or otherwise in need of making an immediate identification (compare *Stovall* v. *Denno* (1967) 388 U.S. 293, 302).

But more importantly, the show-up produced an identification of a man who did not fit the description of the robber Pauletich had given the investigating officer minutes before. Pauletich had told the officer the robber was about 5'8" tall, and 150 pounds (A. 195). Petitioner, on the other hand, was 5'10" to 5'10½" tall, and weighed 178 to 180 pounds (D.X. A, A. 91; A. 275). Further, the investigating officer's on-the-scene handwritten report, prepared after talking with Pauletich, did not list any mustache, whiskers or scar for the robber (P.X. 13 for identification, A. 38), yet petitioner had all three (D.X. A, A. 91).

Despite these inconsistencies, Pauletich adhered throughout cross examination to his identification of petitioner at the show-up. Moreover, he went out of his way on two separate occasions to justify his identification of petitioner, by volunteering on direct examination and later on cross examination some extremely damaging conclusionary and hearsay commentaries, respectively, to demonstrate his belief petitioner was the robber (these comments are briefly set out at pp. 31-32, above). Pauletich, perhaps, illustrates the statement that:

> "Psychologically, the individual who is careless in his observations and weak in memory may often be

> the type of person who makes snap judgments and in whom such qualities as 'pride and stubbornness, make for confirmation of the original identification rather than for open-minded reconsideration' [citing Borchard, Convicting the Innocent (1932), p. 261]" (Wall, Eye-Witness Identification in Criminal Cases (1965) p. 15).

In any event, the facts in this case demonstrate that the confrontation with Pauletich at the show-up was so unnecessarily suggestive and conducive to irreparable mistaken identification that use of Pauletich's identification testimony at trial denied petitioner due process of law (*Stovall* v. *Denno* (1967) 388 U.S. 293, 301-302). Since Pauletich's identification may well have tainted the convictions on the other counts, in view of the prosecutor's *modus operandi* arguments (see p. 76, fn. 30, above), the convictions on all three counts must be reversed and the case remanded for a new trial (*Gilbert* v. *California* (1967) 388 U.S. 263).

Nearly seven years have now passed since the robbery and show-up. Given the difficulties normally incident to making an accurate identification during a time of stress, such as a robbery, the extremely suggestive nature of the show-up and the ordinary human fallibility of dimming recollections with passage of time, it would now be impossible to hold a meaningful hearing to determine whether Pauletich could somehow unscramble his recollections for purposes of giving identification testimony at a future trial (for a discussion of the problem, see generally, Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 5-25).

Justice to petitioner, therefore, requires that any identification testimony by Pauletich be excluded if this case is again brought to trial (cf. *Gilbert* v. *California* (1967) 388 U.S. 263, 272-274; see also *United States* v. *Wade* (1967) 388 U.S. 218, 235-236). Since petitioner was not the instigator of the show-up, he should not now be made to bear the burden of its error.

Better than anything else, this case illustrates the dangers inherent in a show-up where counsel is not present to represent the accused (see *Stovall* v. *Denno* (1967) 388 U.S. 293; see also *United States* v. *Wade* (1967) 388 U.S. 218; *Gilbert* v. *California* (1967) 388 U.S. 263).

(2) The Line-Up

The showing of petitioner in a line-up to Wong, Jow, Perry, Griffith and Jones is described earlier in the brief (see pp. 14-20, above).

Wong and Perry, on direct examination, each testified that he had identified petitioner in the line-up. This testimony was admissible not only to corroborate their in-court identifications, but also as separate, direct evidence of identity (*People* v. *Gould* (1960) 54 Cal.2d 621, 626).

Jow, Griffith and Jones, on cross examination, each acknowledged he too had seen petitioner before, at the line-up, and in one degree or another had made an identification. This also became separate evidence of identity (*People* v. *Gould* (1960) 54 Cal.2d 621, 626; see *United States* v. *Wade* (1967) 388 U.S. 218, 240-241, for an explanation of the dilemma confronting petitioner in attempting such cross examination).

The prosecutor later argued that the line-up identifications showed petitioner was the robber (A. 269-270), and

made irrelevant questions of whether the various witnesses were shown photographs or otherwise coached before trial (A. 294-295, 296).

The line-up was conducted in an atmosphere of hostility, where one witness was plainly "hot" for having to be there, and who had come only because he thought the police wanted him to see if he could identify the man who held him up (A. 152, 158-159). This was Perry. He communicated his impatience by his comments in the elevator, by being first to the window, and by then going out into the corridor shortly thereafter, to point to petitioner and accuse him of being the robber, in view if not in hearing of one of the other witnesses (Griffith).

Moreover, the police left little room for doubt that the line-up contained a suspect. They said as much to Perry, and also to Wong, in asking them to come down to the jail. And at the line-up, the instructions to all were "to look straight through [the window] *and see if we could see the suspect*" (emphasis added) (A. 138).

The line-up showed petitioner in circumstances where he could not be missed. He was standing in the middle, or number 3 position, across from the window (D.X. B, A. 106; A. 69, 140). Unlike those on either side of him, he was the only one dressed like the robber, in sport coat and hat. And he was the only one in the age group of the robber—unlike all the others who were "young guys" (A. 171).

No effort was made to assure the witnesses were identifying the actual robber, rather than just the clothing worn by petitioner. The police did not require any of the other persons shown to be dressed in clothing similar to

petitioner, nor did they require that petitioner exhibit himself without coat and hat. Instead, they emphasized the disparities in his clothing by having petitioner put on his hat at least three times, for the benefit of Wong, Griffith and Jones (see pp. 16-18, above).

With petitioner's singular clothing and difference in age, it is not surprising that Wong could not recall how many persons in the line-up had mustaches or beards (A. 93); or that Griffith did not pay any attention to whether anybody else in the line-up had a scar, and looked at nobody but petitioner (A. 172). For as Griffith said:

> "Didn't nobody have their coat on like that one but you. Ain't nobody else have their coat on because them other guys was young guys" (A. 171).

Further, the police made little effort to assure that each witness would be able to view the line-up free from the influence of the others. All were walked over to jail in a group (A. 168-169). At least some of them heard Perry's comment in the elevator, that if he "saw the guy again in the next hundred years," he would be able to identify him (A. 151-152, 169). And all were gathered together in a small room, where one by one, in front of each other, they were called to the window to look out into the corridor, and make an identification (see pp. 15-19, above).

Despite the "no talking" rule, the inspector himself and each of the witnesses talked as they stood at the window; and later, as Jones said, "[W]e was all talking together" (A. 185). Jones, in fact, said he remembered telling someone petitioner "looked like" the robber, but did not know who the man was or if he was a police officer (A. 186).

Moreover, Jow was aware that "two of the boys" had gone out into the corridor to make an identification (A. 121). And Griffith said he saw "two guys" go up and put their hands on petitioner, while he was looking through the window (A. 169).

Here the line-up incorporated nearly every suggestive feature described and, by implication, condemned in *United States* v. *Wade* (1967) 388 U.S. 218, 232-234). It showed petitioner in a line-up where he was the only person dressed in clothing allegedly worn by the robber; it showed him in the middle of the line-up, where he could not be missed by anyone looking "straight" through the glass (D.X. B, A. 106; A. 139); and it showed him as the only person in the age group of the robber. Moreover, it showed him under circumstances where the police had already indicated that someone in the line-up had committed the offenses (compare Identification Parades, Part I, (1963) Crim.L.Rev. 479, 483). Further, it allowed each of the witnesses ample opportunity to be influenced by the others, first, by the group walk over to the jail, and second, by the massing of witnesses in a small room, and third, by the lax enforcement of a "no talking" rule (see Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 46-51; Identification Parades, Part I, (1963) Crim.L.Rev. 479, 486).

But more importantly, as in the case of the show-up, the line-up produced an identification of a man who did not fit the descriptions of the robber, as set forth in the on-the-scene police reports prepared the night before (P.X. 9 for identification, A. 37; P.X. 11 for identification, A. 37).

The report for the attempted robbery of Wong described a robber with a medium build, 5'6" tall, weighing 150-160

pounds. Yet petitioner was considerably larger, at 5'10"-5'10½" tall, and 178-180 pounds (D.X. A, A. 91; A. 275). Further, the report did not mention a mustache, whiskers or scar, but petitioner had all three (P.X. 9 for identification, A. 37; D.X. A, A. 91).

The report for the robbery of Perry listed a "small scar left side of mouth" for the robber, as contrasted with the large, pronounced scar above petitioner's lip. Further, it described a robber with a husky build, 5'9", 180 pounds, and "nervous," yet in court Perry said petitioner, as the robber, was "cool" (A. 138-139). The report did not list a mustache or whiskers, yet petitioner had both (D.X. A, A. 91). And it described the robber's hat as "brown," but petitioner's hat was black (D.X. 11 for identification, A. 37; A. 205, 282-283, 293-294).

There were other disparities as well. When Wong examined the back of petitioner's hand at the line-up, he saw a dark spot, but apparently could not see any swelling (A. 74). Yet he had brought down his .38 on the pocket of the robber less than 12 hours before. And, as he said at the preliminary hearing, he did not know whether he had caused the dark spot, or not (Tr., Preliminary Hearing, p. 19). Further, even though Perry had looked the robber straight in the face, to familiarize himself with it, he did not remember any hair on the robber's lower lip, or reporting a mustache to the police (Tr., Preliminary Hearing, p. 33; A. 134, 142, 159). Yet he pointed to a man in the line-up who not only had such hair, but a mustache as well (D.X. A, A. 91).

Despite these inconsistencies, Wong, Perry, Griffith and Jones adhered throughout cross examination to their iden-

tification of petitioner at the line-up. Jow, although not too sure of an identification at the line-up, attempted to excuse this circumstance by referring to a glare on the window (A. 116, 121). Perry, moreover, became hostile as questioning progressed, and at one point (in front of the jury) accused petitioner of "trying to play * * * dumb," for seeking answers about the robber (A. 139). Griffith, unlike the other witnesses, refused to answer most of petitioner's questions about the robber, except in the second person (A. 164-177; see p. 32, above for another brief discussion of this testimony). Perry, Griffith and the rest, perhaps, illustrate the statement that:

> "It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined then and there, before the trial" (Identification Parades, Part I, (1963) Crim.L.Rev. 479, 482).

The line-up was one of the most crucial events in the entire case, since it committed each of the viewers, including Jow, to a decision on the basic issue in dispute, namely, the identity of the robber. In the totality of the circumstances in which it occurred, the line-up was so unnecessarily suggestive and so conducive to irreparable mistaken identification, that use of testimony based upon the line-up as evidence of guilt was a denial of due process of law (*Stovall* v. *Denno* (1967) 388 U.S. 293, 301-302). Since this testimony could also have tainted the conviction on count

three, in view of the *modus operandi* arguments, the convictions on all three counts must be reversed and the case remanded for a new trial (cf. *Gilbert* v. *California* (1967) 388 U.S. 263, 272-274).

There is no way now to determine, in any meaningful sense, whether the in-court identifications of petitioner at trial had an independent source (cf. *United States* v. *Wade* (1967) 388 U.S. 218, 241-242; *Gilbert* v. *California* (1967) 388 U.S. 263, 272-274). Within three months of the line-up, at trial, the witnesses themselves could not recall all that had occurred. Perry, for example, could not remember what any of the others in the line-up looked like (A. 139-140); Jow said he was bothered by the glass (A. 121); Griffith could not remember fully what he told the inspector (A. 170); and Jones did not recall whether he talked to the inspector or someone else, in making an identification (A. 185-186).

Wong, perhaps, best illustrates the problem. He said at the preliminary hearing that some of the persons in the line-up had hats, but others did not (A. 72; Tr., Preliminary Hearing, p. 15); at trial, on direct examination, that all had hats (A. 60); and, on cross examination, that he did not pay much attention to, or remember, how many of the others had hats (A. 70, 89). When Jones said he saw others with hats, the trial court would not permit cross examination, on the ground the number of hats was immaterial (A. 186). Yet the official police line-up photograph showed that petitioner was the only one holding a hat (D.X. B, A. 106). And Griffith, contradicting Wong and Jones, said petitioner was the only one he saw with a hat on (A. 171).

Given the relatively short time each of the line-up witnesses, including Perry, had to see the robber (see pp. 5-9, above), the excitement of Wong and Jow (see p. 6, above), the confusion in Perry's liquor store with Griffith backing out and Jones running in (see p. 8, above), the wide discrepancies between the pre-lineup descriptions of the robber and the actual physical appearance of petitioner, and the irreconcilable differences in the testimony describing the robber at trial (see pp. 32-38, above), the Court should not now require petitioner to run the gamut of a hearing on independent source (*United States* v. *Wade* (1967) 388 U.S. 218, 241-242). For it is impossible to say, in the context of this case, how much of the testimony of the line-up witnesses was the product of their own recollections, and how much was the product of influences by the other participants, or of the inherently suggestive procedures used by the police.

Further, with the inevitable dimming of recollections through passage of time, it would be unrealistic to expect any of the line-up witnesses now to be able to reconstruct his memory of the robber, to a degree sufficient to meet minimum standards of fairness to petitioner. On any retrial, petitioner should not be forced to speculate how far the suggestive line-up identification nearly seven years ago has now poisoned the minds of the witnesses. Nor should he be forced to speculate how far these witnesses could set aside their prior in-court testimony and identifications, so as to approach a new trial free of prior commitment (cf. *United States* v. *Wade* (1967) 388 U.S. 218, 235-236, 240). On any retrial, therefore, all identification testimony by those who viewed the line-up should be excluded. Petitioner has already paid the price for the

tainted line-up once; he should not be made to pay it again.[31]

(3) The Photographs of Petitioner

The showing of photographs of petitioner to witnesses, shortly before trial, is described earlier in the brief (see pp. 23-26, above).

The police line-up notes included the following comments:

> "Wit. Jow—Picks #3—not too sure.
>
> "Wit. Griffith, Geo.—Picks #3 as looking like the man, not too positive.
>
> "Wit. Jones, Robt.—Picks #3—'That's the man.' Saw him without the hat—After he saw him with hat on he was positive—" (P.X. 3 for identification, A. 35).

Following the line-up (May 5th) was the preliminary hearing (May 16th), and the arraignment (June 11th). Two months then went by. In mid-July, before trial, the police delivered photographs of petitioner to Jow, along with a subpoena to testify. About the same time, the district attorney's office called in Griffith and Jones, and at separate meetings members of the district attorney's staff showed each of them a photograph of petitioner.

Later, at trial, Jow was a principal identification witness on count one (attempted robbery of Wong); Grif-

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[31] Were the line-up cases to be applied retroactively, of course, there would be no doubt that petitioner would be entitled to a reversal on all three counts, since he was not represented by counsel either at the show-up (cf. *Stovall* v. *Denno* (1967) 388 U.S. 293) or at the line-up (see *Gilbert* v. *California* (1967) 388 U.S. 263; *United States* v. *Wade* (1967) 388 U.S. 218).

fith and Jones were two of the three identification witnesses on count two (robbery of Perry).

Jow said the photographs refreshed his memory of petitioner and made him sure he was looking at the robber (A. 118, 122). Griffith denied the picture he saw refreshed his memory of the robber, but admitted it refreshed his memory of petitioner (A. 174). Jones said he recognized petitioner in the photograph as the same person he had seen in the line-up, but denied the photograph refreshed his memory of petitioner (A. 186-187).

Jow saw front and side view "mug" shots. They showed petitioner bare headed, as he would appear in court. They showed a mustache, whiskers under the lower lip, what appeared to be a scar on the right cheek, and a plainly visible scar running outward from the left upper lip (D.X. A, A. 91). The on-the-scene police report, however, prepared the night of the attempted robbery from the collective descriptions of Wong and Jow, did not make any reference to a mustache, whiskers or scar (P.X. 9 for identification, A. 37). Yet Jow, shortly after being shown the photographs of petitioner, testified at trial that the robber had a "little" mustache (A. 113), a "little" whiskers (A. 113), and a scar (A. 112-114).

The record does not disclose what photographs were shown to Griffith and Jones. On the night of the robbery, Griffith did not pay attention to a mustache or lip whiskers, but saw only a scar (see pp. 33-34, above). Yet, when shown a photograph of petitioner, he did not notice or pay attention to scars but instead "just looked at the face" (A. 173). Jones, on the other hand, saw a scar in the photograph, but none on the robber (A. 180, 185). De-

spite these incongruities, both Griffith and Jones later testified to an identification of petitioner at trial.

No counsel was present to represent petitioner when the police officer showed the photographs to Jow (A. 122). Nor does the transcript show that counsel was present when photographs were shown to Griffith and Jones (A. 172-174, 181, 184-185, 186-189). Yet these events occurred after arraignment, when it was clear petitioner had been represented at that time, at least, by the public defender (Clerk's Transcript on Appeal, p. 4).

Petitioner, of course, was not present at the showing of photographs, because he was in jail (Tr. 26, 532, 539, 638).

Nor, indeed, was any mention made of the photographs by Jow, Griffith or Jones on direct examination, when each gave his description of the robber. And when each revealed seeing the photographs on cross examination, petitioner was then in the predicament described in *United States* v. *Wade* (1967) 388 U.S. 218, 240-241—of dwelling on their identifications, by probing in the dark on the use of the photographs.

There was no justification for the showing of photographs to Jow, Griffith and Jones. It was unnecessary in terms of an immediate need for identification, since petitioner was already in custody and bound over for trial (cf. *Simmons* v. *United States* (1968) 390 U.S. 377, 384-386; *Stovall* v. *Denno* (1967) 388 U.S. 293, 302). Moreover, there was every likelihood that this procedure would lead to an irreparable misidentification:

First, the photographs were shown nearly two and one-half months after the events in question, when memories no longer were fresh;

Second, they were shown to one witness, Jow, who had been "excited" at the time of the offense, and who had collaborated on a description which, at least as written down by the investigating officer, did not fit the description of petitioner (see pp. 6-7, 85-86, above); to another, Griffith, who had been "afraid" and who had run out of the store when he heard the robber say "I am not kidding" (A. 165; s[illegible] p. 8, above); and to still another witness, Jones, who had but a "slight look" at the robber for "just a short period of time" (A. 181); and

Third, the photographs were shown under pressure, with the service of a subpoena to Jow, and during a meeting with Griffith and Jones after they had been called to the district attorney's office. It was apparent to all three that they would soon be called upon to testify, and that the authorities believed petitioner was the robber, and were depending in some degree upon them to so testify, in court.

It is no answer to say, as did the prosecutor at trial, that any attorney will want to talk with his witnesses (A. 295). It is one thing for a prosecutor to talk with witnesses before trial; it is quite another to show photographs of an accused, just before trial, to witnesses who may have been unable, for whatever reason, to make a positive identification at a prior line-up. Or to a witness, such as Jones, who appeared to rest his identification, in part,

upon clothing rather than the physical appearance of the accused.

What purpose was there in showing the photographs, other than to refresh recollections and promote in-court identifications? But this is little better than knowingly obtaining tainted evidence (cf. *Miller* v. *Pate* (1967) 386 U.S. 1), for showing the photographs could only have left a direct, fresh image of petitioner in the minds of the viewers, thereby diluting to some extent their individual recollections of the man they saw the night of the crimes (see Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 68-72). Yet such individual, unstructured recollections were crucial if cross examination were to have any meaning (see *United States* v. *Wade* (1967) 388 U.S. 218, 240-241).

Even more than a line-up, the showing of photographs was coupled with extreme hazards to the accused. For as has been said:

> "In considering the effect which the use of photographs may have upon the reliability of an identification, * * * the first [principle] is that where a photograph has been identified as that of the guilty party, any subsequent corporeal identification of that person may be based not upon the witness's recollection of the features of the guilty party, but upon his recollection of the photograph. Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he has previously identified may say, 'That's the man that did it,' what he may actually mean is, 'That's the man whose photograph I identified.' Sir Richard Muir, one of the greatest English prosecutors of modern times, was always con-

cerned about the reliability of such identifications, believing that 'however honest a witness might be, he could not shut out from his mind the features of the man he had seen in the photograph.' The witness's inability to do so is not at all surprising, since the corporeal identification is always closer (and often much closer) in time to the photographic identification than it is to the crime, and since the witness usually studies the photographs far more carefully and for a longer period of time than he was able to study the features of the perpetrator of the crime" (Wall, Eye-Witness Identification in Criminal Cases (1965) p. 68).

In any event, taking the police notes at their face value, the showing of photographs to Jow, Griffith and Jones was so unnecessarily suggestive and so conducive to an irreparable mistaken identification that use of their identification testimony later at trial denied petitioner due process of law (see *Stovall* v. *Denno* (1967) 388 U.S. 293, 301-302). Since this testimony on counts one and two may well have tainted the conviction of count three, in view of the prosecutor's *modus operandi* arguments, the convictions on all three counts must be reversed, and the case be remanded for retrial (*Gilbert* v. *California* (1967) 388 U.S. 263).

Moreover, the showing of photographs in the absence of counsel was, by itself, a denial of petitioner's rights under the Sixth Amendment, to be represented at each and every critical stage of the proceedings (*Gilbert* v. *California* (1967) 388 U.S. 263; *United States* v. *Wade* (1967) 388 U.S. 218). Indeed, in many respects, the display of photographs was little more than an aggravated form of

"show-up" (see Wall, Eye-Witness Identification in Criminal Cases (1965) pp. 74-77).

Finally, for the same reasons that the identification testimony of the other line-up witnesses must be excluded from any future trial of petitioner, so, particularly, must the identification testimony of Jow, Griffith and Jones, because of the overlapping and, for all practical purposes, immeasurable taint that resulted from the showing of photographs. It would be unreasonable to suppose that now, nearly seven years later there could be any meaningful unscrambling of the recollections of the robber, from recollections of the line-up and showing of photographs. In short, because it is now impossible to measure the taint of the use of photographs, the State, not petitioner, should be made to bear the burden of their use.

D.

Petitioner Was Denied the Right to Counsel at Trial, When the Court Required Him to Go to Trial Without Counsel, After He Refused to Accept Further Representation by the Public Defender's Office. Petitioner Was Also Denied Counsel on Appeal, When the Appellate Court Refused to Appoint Counsel to Brief or Argue Petitioner's Case on the Two Remands.

Petitioner was denied counsel both at trial and on appeal, following the two remands. In each instance, the refusal to appoint counsel was a violation of petitioner's rights under the Sixth Amendment, in its bearing upon the State through the Fourteenth Amendment (*Gideon* v. *Wainwright* (1963) 372 U.S. 335; *Douglas* v. *California* (1963) 372 U.S. 353).

(1) At Trial

The circumstances of the denial of counsel at trial are summarized earlier in the brief (see pp. 27-28, above).

An assistant public defender represented petitioner at the preliminary hearing (Tr., Preliminary Hearing, p. 2). About three weeks later, the public defender appeared for petitioner at arraignment (Tr. 3), and thereafter made four successive appearances for petitioner on different matters relating to the case (Tr. 7, 9, 10, 13). In each instance, including the preliminary hearing, petitioner was present in court, to hear what was said (Tr., Preliminary Hearing, p. 4; Clerk's Transcript on Appeal, pp. 4-8).

On the arraignment, the public defender moved for a separate trial on each of the three counts (Tr. 5-6). He did not argue the matter, but asked the judge to take it under submission (Tr. 6). A week later, at a separate hearing, the prosecutor opposed the motion (Tr. 7). The defender, as his sole argument, said the "pleading [i.e., the information] is very defective, and there is no allegation of proper joinder in this matter" (Tr. 7). After a brief response from the prosecutor, the motion was denied (Tr. 7).

Additional time passed. In early July, at a hearing to set a trial date, the public defender allowed petitioner to make his own motion for separate trials (Tr. 10). The motion, somewhat inarticulate, was based on constitutional grounds—namely, that a single trial on the similar offenses would deprive petitioner of a fair and impartial hearing (A. 10-11). The defender informed the court that a motion for separate trials had already been denied, and that petitioner was in effect urging the same motion, but on different grounds (Tr. 11-12). "He wants three trials," he

said, "which is reasonable" (Tr. 12). Without hearing anything from the prosecutor, the court summarily denied the motion (A. 12).

About a week later, on the fourth appearance by the defender, petitioner asked the court to "rule on the constitutionality of this similar offense law" (Tr. 14). Instead of helping petitioner, the public defender told the court he did not know "what he [petitioner] is talking about now" (Tr. 14), and stated, in response to a question by the court, that the point "as to joining the three counts in the information" had been ruled upon (Tr. 14). The court, in any event, said that petitioner was talking about the three counts, and being tried on the three at one time (Tr. 14). After a brief colloquy, the motion was again denied (A. 14). When this happened, petitioner then asked the court appoint counsel other than the public defender (Tr. 15).

Petitioner advised the court that he wanted other counsel because, among other things, the records showed that the public defender had lost an unduly large number of cases in which the district attorney's office had been involved, and said that in his opinion, it appeared that the public defender's office did not have an organization that was a match for the district attorney's office (Tr. 15-16).

The judge said to petitioner that the public defender's office was very able, and that in asserting that the public defender had lost an unduly large number of cases, petitioner was "sort of overlooking the facts of the case" (Tr. 16). The judge went on to say that he had not "noticed any convictions that the District Attorney has been getting that doesn't seem warranted by the facts" (Tr. 16).

At this point, petitioner advised the court that if counsel other than the public defender were not appointed, he

would prefer to represent himself (Tr. 16). However, he advised the court that he was not waiving counsel (Tr. 16-17). After hearing this, and also that petitioner had no money to employ outside counsel, the court advised petitioner that he could relieve the public defender, but that in such case, the court would direct the public defender to have a member of his office present to sit in court and offer such advice and assistance as petitioner might seek (Tr. 17).

The public defender objected to the court's order to have a member of his staff sit in court, during trial. He made the following comments to the judge:

"Mr. Pulich [the public defender]: May I be heard on the matter?

"The Court: Make it brief, because one member of your office is going to be here.

"Mr. Pulich: Well, your Honor, as the Court is aware, People versus Matson specifically covers this subject.

"And I feel if the defendant wants to represent himself that practical advantage that he will have in being the poor little boy picked on by the nasty District Attorney is being completely dispelled when counsel is seated alongside him.

"Now, he looks like a wise guy who is trying to take advantage of something. I believe this mixed marriage won't work. Either we should be in with all the responsibilities of the case, or we should be out and he go forth alone.

"I am sure that Mr. Banks, from his thorough reading of the Supreme Court cases which he assures me he has done and has quoted them to me, is sufficiently

aware of the fact that when he chooses to represent himself the Court will hold him by the same standards as other counsel and the same limitations.

"And if he happens to fail to remember one of those legal points that he had read, it is going to bounce on him" (emphasis added) (Tr. 17-18).

The court, despite this argument, said that if the matter were a misdemeanor he would be inclined to go along with the public defender, but that since petitioner was charged with two counts of robbery, three prior convictions, and also attempted robbery, petitioner should have counsel available to be used by him, if he so desired (Tr. 18-19). The court then granted petitioner's motion that the public defender be relieved as counsel, and granted petitioner's request to stand in *pro per* (Tr. 19). It ordered the public defender, once more, to make available a member of his staff (Tr. 19).

Nine days later, petitioner's case was called for trial before another judge (Tr. 29). An assistant public defender was present (Tr. 29). Petitioner renewed his motion for counsel other than a public defender (Tr. 30, 34). He told the judge that he did not believe the public defender was qualified (Tr. 32-33); he said, among other things, that if he had other counsel, he believed he would have a "fair break" (Tr. 33), and that a private lawyer would work harder to present a defense (Tr. 34).

The judge, after stating that he did not think anyone could properly defend himself, in *pro per,* went on to say that he could not appoint outside counsel in lieu of the public defender (Tr. 36-39). Hearing this, petitioner said that he would prefer to represent himself, rather than accept

the public defender (Tr. 39). He said that he disagreed with the court's opinion that the public defender's office was efficient and competent (Tr. 40).

The judge then conducted a brief hearing into petitioner's background. It was discovered that petitioner had only a sixth grade education, that he had spent nearly 22 years in prison, and that he was on parole, that he had been hospitalized for psychiatric treatment while in prison, that he was working in a nearby town as a plumber, and that he was emotionally upset about the charges, because he said he was not guilty (Tr. 42-44).

Despite these facts, however, the judge concluded that petitioner would be able to defend himself and ordered him to choose between the public defender or no counsel at all (Tr. 45-47).

The judge then advised petitioner that he would have a right to appeal, whether he was represented by an attorney or not (A. 25). Petitioner said he understood, and added the comment that "it looks much better going up without counsel" (A. 25). By this he meant, as he explained in his next sentence, that he believed it was possible to appoint counsel other than the public defender's office (A. 25).

The record does not show whether this second judge, at the time he ruled on the request for counsel, knew of the accusations made by the public defender before the first judge (see pp. 99-100, above).

In any event, the second judge then advised petitioner that if he represented himself, the mere fact that he was proceeding in *pro per* would not entitle him to "privileges or indulgences accorded to attorneys or * * * to defendants who are represented by counsel" (Tr. 48). After

this, petitioner asked for a "change of venue" back to the first judge (Tr. 49), on the ground that he was more familiar with the case and with all the motions that had been made beforehand (Tr. 49). The motion was granted.

Five days later, petitioner came to trial before the first judge (Tr. 52).

The judge, before trial, told petitioner that if he wanted to have the public defender reappointed, that could be done (Tr. 53). But petitioner would not accept the public defender. He said that he believed he had a right to have counsel other than the public defender, and that he was not asking the court to appoint any specific attorney, just someone other than the defender (Tr. 53-54). The same assistant public defender who was present with petitioner before the other judge, was present this time also (Tr. 29, 52). He did not, however, mention to the court anything about petitioner's background.

When the court again denied the request for counsel, petitioner stated that he did not want to have the public defender participate in the case at all (informally or otherwise) (Tr. 54). While the reason for petitioner's statement is not entirely clear from the record, it would appear that he was concerned that if anyone from the public defender's office were present in court, his right to counsel might somehow be deemed waived or diluted (Tr. 55-56). He repeated, though, his belief that he was entitled to counsel he believed competent (Tr. 55).

The court denied petitioner's request to exclude the public defender, and ordered the assistant defender to sit in court, just inside the rail, about eight or nine feet behind the counsel table (Tr. 56, 59). He told the defender, how-

ever, that he could not speak during trial, or raise any objections (Tr. 60).

Petitioner then went to trial in *pro per*. He was under a substantial handicap throughout the proceedings, since he was in jail and was unable to contact an expert witness that he wanted (see p. 27, above), or see to it that his subpoenas were served (see p. 44, above).

From the outset, the prosecutor took advantage of petitioner: first, by calling a police inspector to identify (but not introduce in evidence) a series of documents which implied to the jury that the State had an open and shut case (see pp. 29-30, above); second, by introducing in evidence a diagram of the streets in West Oakland, not drawn to scale, in circumstances where he knew petitioner was in jail and would be unable to verify the accuracy of this diagram (see pp. 30-31, above); third, by permitting at least one of his witnesses (Griffith) to answer all of petitioner's questions concerning the robbery in the second person, rather than in the third person as called for in the questions (A. 164-177); and finally, among other things, by allowing the trial judge to give instructions not supported by the evidence on armed robbery and robbery by torture, and further instructions not supported by the record to the effect that evidence had been offered to show that defendant had committed a crime other than the ones for which he was on trial, but which could be considered by the jury in reaching a verdict (A. 308, 310).

On appeal, it was held that petitioner had waived counsel, by insisting on going to trial with someone other than the public defender (A. 318-319).

Whatever may have been the actual qualifications of the public defender's office, petitioner was entitled to rep-

resentation by an attorney in whom he had confidence. His liberty was at stake. He, more than the public defender or anyone else, stood to lose if a conviction were obtained.

The public defender had been less than vigorous in arguing for separate trials on each count (Tr. 7-8, 10-12). Further, the defender had deprecated petitioner's final request for reconsideration of the motion for separate trials, by telling the judge he did not know what petitioner was talking about (Tr. 14). Yet this motion went to the heart of the case, because it would have eliminated the attempt to link petitioner to all three offenses through the *modus operandi* argument (A. 270, 298).

Moreover, petitioner's request for outside counsel was timely, and was not impossible of fulfillment, since he had not asked for any specific attorney, but only for other counsel as the court might select.

No one with sufficient funds to hire an attorney would intrust his fate to counsel in whom he had no confidence. An accused, because he is an indigent, should not be placed in any different position (cf. *Gideon* v. *Wainwright* (1963) 372 U.S. 335, 344). Once the court is satisfied there is a genuine lack of confidence, as here, then if the right to counsel means anything at all, substitute counsel must be appointed. Otherwise, the appointment of counsel to represent an accused becomes a mere observance of form, rather than a meaningful guarantee of the right to a fair trial (cf. *Avery* v. *Alabama* (1940) 308 U.S. 444, 446; *Brubaker* v. *Dickson* (9 Cir. 1962) 310 F.2d 30, 37, certiorari denied (1963) 372 U.S. 978).

Wholly apart from the right of petitioner to request outside counsel, because of lack of confidence in the public defender, the trial court had no alternative but to ap-

point new counsel once the public defender, in his presence, had called petitioner a "wise guy" and displayed hostility (see pp. 99-100, above).

To insist thereafter that petitioner accept the public defender, or go without counsel, was, in effect, to compel a waiver. For if nothing else, petitioner had a right to undivided loyalty of counsel (see *MacKenna* v. *Ellis* (5 Cir. 1960) 280 F.2d 592, 599, opinion modified (as to procedure on remand) (1961) 289 F.2d 928, certiorari denied (1961) 368 U.S. 877). Once the public defender made his comments to the judge, in open court, petitioner had every right to doubt that such loyalty would be forthcoming. He should not have been compelled to speculate that the public defender might somehow overcome his initial animosity and go on to provide effective assistance at trial.

No individual, who was paying for an attorney, would long tolerate being called a "wise guy" in front of a trial judge, whatever the provocation might have been. The Sixth Amendment should not command that an indigent tolerate such conduct either.

In the circumstances of this case, petitioner was effectively denied his right to counsel when the court refused to appoint someone else, other than the public defender. It is no justification now to say, as the trial judge did after petitioner had been convicted on all three counts, that petitioner had conducted his defense "about as good" as the average young attorney in his first few trials out of law school (Tr. 637) (cf. *MacKenna* v. *Ellis* (5 Cir. 1960) 280 F.2d 592, 599-600, opinion modified (as to procedure on remand) (1961) 289 F.2d 928, certiorari denied (1961) 368 U.S. 877; *Townsend* v. *Bomar* (6 Cir. 1965) 351 F.2d 499; *Mosley* v. *Dutton* (5 Cir. 1966) 367 F.2d 913, certiorari denied (1967) 387 U.S. 942).

As disclosed by the record, the denial of petitioner's request for counsel led to unfairness in the proceedings which cannot now be remedied without a new trial. The convictions below, therefore, should be reversed and the case remanded for a new trial (see *Gideon* v. *Wainwright* (1963) 372 U.S. 335).

(2) On Appeal

The circumstances of the denial of counsel on appeal are summarized earlier in the brief (see pp. 57-58, above).

Apart from the refusal of the trial court to appoint counsel at that stage of the proceedings, the Court of Appeal erred when it refused to appoint counsel to brief or argue petitioner's case on the first and second remands from this Court. Although counsel originally had been appointed to represent petitioner on the appeal, that attorney had indicated by his actions that he was not particularly interested in taking timely efforts on behalf of petitioner, or otherwise pressing forward petitioner's case with vigor (see p. 57, above; see also A. 316).

The record does not indicate whether petitioner ever sent to the clerk of the Court of Appeal the letter he received from his attorney, withdrawing from the case (A. 323). But even if the Court of Appeal did not see that letter, it was apparent by the time of the decision on the first remand that counsel had not appeared or presented argument, or a brief, on behalf of petitioner. Further, when petitioner then sought certiorari to review the decision, he listed as one of his issues the fact that he had been denied the assistance of counsel on appeal (Petition for a Writ of Certiorari, O.T. 1966, No. 889 Misc., pp. 6-7). At this stage, it was clearly known to the Attorney Gen-

eral's office, if no one else, that petitioner was asserting a right to counsel and that he had not been represented on the first remand.

When the case was remanded the second time, fairness to petitioner required that the Attorney General take steps to see that the Court of Appeal was informed of the withdrawal of counsel, and new counsel appointed. In any event, once the case had been remanded a second time, it was error for the court to persist in its refusal to appoint counsel to brief or argue the case. This refusal was magnified by the denial to petitioner of any right to present oral argument on his own behalf.

The required inquiry in a *Chapman*-type remand, on a harmless error issue, is basically a factual issue. As should be obvious from the brief filed herein, if from nothing else, the record in this case was far from simple. There were three separate crimes charged to petitioner; there were 16 witnesses who testified; there were 31 exhibits introduced in evidence or marked for identification.

Further, during the first remand, when petitioner was not represented by counsel, the district attorney removed the trial exhibits from the records of the Superior Court and eventually destroyed the most crucial ones, namely, the clothing worn by petitioner at the time of his arrest, and the diagram used to locate the stores for the jury (see pp. 30-31, 38-39, above; see also A. 270). Had counsel been appointed to represent petitioner on the second remand, his first step would have been to bring such destruction to the attention of the court. These trial exhibits, as the others, were crucial to any determination whether the *Griffin* error was harmless beyond a reasonable doubt. But this matter was never brought before the court.

Under the circumstances, petitioner was denied a meaningful hearing on the two remands when the court refused to appoint counsel (*Douglas* v. *California* (1963) 372 U.S. 353; *Anders* v. *California* (1967) 386 U.S. 738). Nothing prevented the Court of Appeal from appointing counsel. All it took was an order. Merely maintaining an appearance of counsel, by keeping an attorney's name on the docket sheet as counsel of record, did not provide petitioner with the effective assistance to which he was entitled in the court below.

Finally, the right to counsel on appeal will not become moot even should the decision below be reversed on some other ground, since counsel may still be necessary on remand if there are to be further proceedings in the Court of Appeal.

Conclusion

For the above reasons, the judgment below should be reversed, and this Court should remand to the District Court of Appeal, with the instructions that on any new trial of petitioner, all identification testimony from witnesses who participated at the line-up, at the show-up, or who were shown photographs before trial be excluded from evidence.

Respectfully submitted,

THOMAS J. KLITGAARD
Attorney for Petitioner

Dated: April 4, 1969

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In the Supreme Court
of the
United States

OCTOBER TERM 1968

No. 670

FRED BANKS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

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In the Supreme Court

of the

United States

OCTOBER TERM 1968

No. 670

FRED BANKS,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

Brief for the Respondent

OPINIONS BELOW

On September 16, 1964 the Court of Appeal of the State of California filed an opinion affirming petitioner's conviction for robbery and attempted robbery. That opinion, which was certified for nonpublication, is set forth in its entirety in the Appendix at pages 317-322.

By order dated November 10, 1964, the California Supreme Court denied a petition for hearing. Its order issued without opinion is not officially reported.

Following the *per curiam* decision of this Court on January 24, 1966 in *Banks v. California,* 382 U.S. 420 (1966)

granting a petition for writ of certiorari, vacating the judgment of the Court of Appeals and remanding the case "for further proceedings in light of *Griffin v. California,* 380 U.S. 609 (1965)," the Court of Appeal reconsidered and reaffirmed petitioner's conviction in an opinion filed May 20, 1966. That opinion, which also was certified for nonpublication, is set forth in the Appendix at pages 332-334. Petitioner did not file a petition for hearing in the California Supreme Court following this decision.

After the second *per curiam* decision of this Court issued on May 15, 1967 in *Banks v. California,* 387 U.S. 92 (1967) granting a petition for writ of certiorari, vacating the judgment of the Court of Appeal and remanding the case "for further consideration in light of *Chapman v. State of California,* 386 U.S. 18 (1967)," the Court of Appeal again reconsidered and reaffirmed petitioner's conviction in an unpublished opinion filed October 2, 1967. That opinion, from which review is sought here, is set forth in the appendix at pages 341-342.[1]

Again petitioner did not seek review in the California Supreme Court by filing a petition for hearing.

JURISDICTION

Petitioner asserts that he is invoking the jurisdiction of this Court under 28 U.S.C. 1257(3). For the reasons set forth below, however, it is respondent's position that this Court is without jurisdiction to consider this case.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review the decision of the Court of Appeal since the judgment sought to be reviewed is not that of the highest state court.

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1. Abbreviations used hereinafter are as follows: "A." for Appendix; "R." for the trial transcript.

2. Whether comment on petitioner's failure to testify constituted error under the facts and circumstances of this case; if so, whether the comment was harmless beyond a reasonable doubt.

3. Whether petitioner was denied the right to counsel on appeal.

Petitioner raises a number of other questions which were no contained in the petition for writ of certiorari, and are not properly before this Court. They are:

1. Whether use at trial of petitioner's silence in the face of accusation constituted a violation of the privilege against self-incrimination.

2. Whether petitioner was denied his constitutional right to counsel at trial.

3. Whether the line-up and other procedures used by law enforcement officials denied petitioner a fair trial.

STATEMENT OF THE CASE

On August 7, 1962, following trial by jury, petitioner was convicted in the Alameda County Superior Court of two counts of robbery in the second degree and one count of attempted robbery in the second degree. Concurrent indeterminate sentences were imposed (A. 20, 21).[2] Three prior convictions were charged and admitted prior to trial (A. 20, 21).

At the trial petitioner, a 48 year old Negro male, was identified by six witnesses who were present at four different liquor stores in Oakland, California, as the person who, within the space of approximately one hour and while simulating a gun in his right hand coat pocket, robbed two

2. The statutory penalty for robbery in the second degree is an indeterminate sentence of one year to life (Cal. Pen. Code §§ 213; for attempted robbery in the second degree the penalty is imprisonment for not more than twenty years (Cal. Pen. Code § 664(1)).

stores, attempted to rob another, and was finally arrested in a fourth store.

The facts with respect to each event are as follows:

I. The Events of May 4, 1962.

A. COUNT I—THE ATTEMPTED ROBBERY AT VINCE'S LIQUOR STORE, CORNER OF 12th AND PERALTA STREETS IN OAKLAND.

On Friday night, May 4, 1962 at approximately eleven o'clock, a man identified at trial as the petitioner, entered Vince's Liquor Store, located at the corner of 12th and Peralta Streets in Oakland, California (A. 54-55, 108). Mr. Roger Wong, a co-owner of the store, and Mr. Harry Jow, an employee, were waiting on the five to six customers present (A. 54-55, 65, 108). Each was standing at separate cash registers located approximately five feet apart at a counter (A. 55-56, 109-110).

Petitioner walked to the rear counter at which Mr. Jow was working, and stood directly across the counter from him at a distance of approximately 2½ to 3 feet (A. 108, 118). When Mr. Jow said, "Yes, sir, could I help you," petitioner lifted his right hand which was inside his coat pocket as if he had a gun, and said, "Yes, give me all your money" (A. 108-109). When Mr. Jow asked petitioner again what he wanted, petitioner repeated his demand and said, "Do you want to die?" and "Then give me all your money" (A. 109).

At first Mr. Wong had not paid attention to petitioner. But when he heard these words and Mr. Jow's louder reply, "All the money?", he looked over at petitioner, and saw the pocketed hand on the counter (A. 55-56, 58, 100). He picked up a .38 pistol from under the counter at which he was working, reached over and struck the hand in the pocket (A. 57, 100). Petitioner stepped back "a little bit" and Mr. Wong took "a look" at him (A. 94-95). He ordered

petitioner to put his hands up. Instead petitioner cursed Wong and said, "Go ahead, shoot me" (A. 57, 74). Mr. Jow also told Mr. Wong to shoot, but Mr. Wong did not want to kill anybody (A. 57, 75).

Petitioner then left the store and Mr. Wong called the police (A. 57, 80). When they arrived "six or seven minutes later" he and Mr. Jow both gave a description of petitioner (A. 81-82, 112). The description included the facts that he was "stout, about 50 years old, dark complexion, sport jacket, and a shirt kind of yellow" (A. 81-82, 112). Mr. Wong also told the police that he had hit petitioner with the gun (A. 66).

At first, Mr. Wong had thought petitioner must be drunk to try to rob a store where so many customers were present, but after observing petitioner more closely, he changed his mind and even gave petitioner "lots of credit" for trying (A. 78-79, 87-89).[3]

B. COUNT II—THE ROBBERY AT THREE POINT LIQUORS ON 17th AND PERALTA STREETS.

Fifteen minutes later at approximately 11:15 p.m., a man identified at trial as petitioner entered the Three Point Liquor Store located at the corner of 17th and Peralta Streets (A. 126-127, 130-131, 142). There Mr. Robert E.

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3. Throughout his brief petitioner refers to various police reports including those made at the scene of the robbery and at the lineup (*see, e.g.,* Pet. Br. 6-7, 9, 11, 33). However, petitioner has failed to show in what way, if any, these materials are properly before the Court. These materials were identified at trial as People's Exhibits Nos. 1-17 only for discovery purposes, but were never introduced into evidence (A. 33-42). Indeed, in referring to these documents petitioner cannot comply with Rule 40 of this Court which is limited to exhibits "offered in evidence." Furthermore, these documents and the preliminary transcript were never before the Court of Appeal. *Lawn v. United States,* 355 U.S. 339 (1958); *McClellan v. Carland,* 217 U.S. 268 (1910). However, in the event these materials should be considered by the Court, they fully support the witnesses identifications and testimony at trial.

Perry, a clerk, was on duty (A. 126). Petitioner approached Mr. Perry who was standing at the counter and with his right hand in his coat pocket said, "Hand over the money" (A. 127). Petitioner was "so cool" that at first Mr. Perry thought he was kidding (A. 127, 138). Consequently, when Mr. George Griffith walked in, Mr. Perry started to wait on him (A. 127, 161). Petitioner then said, however, "If you don't want to jeopardize your life, hand over the money. And I'm not kidding." He began to wave his pocket back and forth (A. 127-128). Mr. Perry handed petitioner some money from the register, but when petitioner said, "That isn't all. Give me all of the money," Mr. Perry did so (A. 128).

In the meantime Mr. Griffith who had been standing beside petitioner started to back toward the door (A. 162, 167). As he did so, another customer, Robert Jones, entered the store and Griffith told Jones, "Man, that guy is holding up the store" (A. 162, 178). Jones, however, misunderstood Griffith and thought he said that Perry was "closing up" (A. 153, 164-165, 178). Accordingly, he immediately dashed into the store just as petitioner was backing up and almost knocked petitioner down (A. 153, 164-165, 167). He saw petitioner with money in his left hand and heard him say, "I'm desparate [sic], don't reach for nothing," and petitioner "looked back" in his face (A. 178-179, 184). After petitioner left the store, Mr. Griffith followed him "10 or 15 steps" until petitioner walked into the dark (A. 162-165).

When the police arrived in response to Mr. Perry's phone call, he gave a description of petitioner, which included his color; the fact that he had a scar on the left side of his face; and that petitioner was wearing a sport coat and hat (A. 133, 136-137). Mr. Griffith also told them that petitioner had a scar on the left side of his face, that he was wearing

a sport coat and hat, and a "yellowish-looking" shirt (A. 165-166). Mr. Jones told the police that petitioner "backed up" in his arms with money in one hand and the other hand in his pocket (A. 183). Although Mr. Perry did not know how much money he lost, or recall the amount he had told the police, he estimated the amount to be "close to a hundred dollars" (A. 129, 137, 140, 143, 147-148, 150).

C. COUNT III—THE ROBBERY AT LINDEN LIQUORS AT 1051 - 16th STREET IN OAKLAND

A short time later, at approximately 11:30 that night, a man again identified at trial as the petitioner, entered Linden Liquors at 1051 - 16th Street, where William Pauletich, a part-owner, was on duty (A. 190-191, 194). Two customers and Mr. Pauletich's mother were present (A. 191). When petitioner reached the counter at which Mr. Pauletich was standing, he had his right hand in his coat pocket pointing it at Mr. Pauletich as if he had a gun (A. 191). He seemed calm and at first both he and Mr. Pauletich "kind of hesitated for a little while" (A. 191). In fact, at one point, as Mr. Pauletich was "taking a few steps one way and another," petitioner said, "Go ahead and press the button and notify the cops, if you want" (A. 201). Mr. Pauletich's mother came over and asked what petitioner wanted (A. 192). Mr. Pauletich told her and she gave petitioner money from the register, giving him currency only as petitioner had directed (A. 192). Mr. Pauletich later estimated that his mother gave petitioner $165, in denominations of $20, $10, and $5, and between 30 to 40 $1 bills (A. 192, 194).

As petitioner was leaving the store, a customer, Sam Slaise was approaching (A. 220-221). He saw a man come out of the store with his right hand in his pocket and holding money in his left hand (A. 222-223). When Mr. Pauletich told him to watch where the man went, he followed him

down 16th Street toward Chestnut Street (A. 206, 222). In the middle of Chestnut Street the man got into a car and turned right on 18th Street (A. 224).

The police arrived at Linden Liquors shortly after Mr. Pauletich called them (A. 210). As he could recall, he described petitioner as a colored person, "about my size," wearing a sport coat and hat, with a scar or a scratch on his face (A. 195).

About half an hour later Mr. Pauletich again saw petitioner when two police officers brought him back to the store (A. 193). When the officers asked Mr. Pauletich if petitioner was the man who had robbed him, he walked to the end of the counter to look at petitioner, and said that he was (A. 199-200).

D. THE ARREST AT SOBEK'S LIQUORS AT 21st and MARKET STREETS.

The evidence later adduced at trial showed that petitioner had been arrested at Sobek's Liquor Store at 21st and Market Streets. When petitioner had entered the store shortly before midnight, he first had asked Mr. Coatsie Smith, Jr. if he was the owner (A. 226-227). After learning that Mr. Smith "just worked there," petitioner asked him if he had a gun (A. 227-228). When Mr. Smith asked why he wanted to know, petitioner said, "Well, I might want to hold you up" (A. 228). Just then Officer Harry E. Nielsen walked into the store and petitioner proceeded to ask Mr. Smith for a half-pint of Old Taylor (A. 228, 239, 246-247). However, Mr. Smith told Officer Nielsen that he did not like what petitioner had said and related the statement (A. 228). In response, Coatsie Smith was told that there had been some robberies in the area and petitioner was told that, "Buddy, you fit the description" (A. 228). When petitioner made no reply, Officer Nielsen placed him under arrest (A 233, 239.) In searching for a weapon, he discovered some

"rumpled" cash in the breast pocket of petitioner's shirt, and later at police headquarters found more money in a pocket and wallet (A. 239). In total he found $176.00, including seven $10 bills, fifteen $5 bills, and thirty-one $1 bills (A. 240-241). When Officer Nielsen asked petitioner where the money came from, petitioner responded that he had cashed a pay check that day (A. 247). At some point he also told Officer Nielsen that he did not rob anyone (A. 248).

After stopping at the Linden Liquor Store where Mr. Pauletich identified petitioner as the man who had robbed him a short time before, petitioner was taken to the Inspector's Division of the Oakland Police Department (A 240-241). Officer Nielsen, who was concerned about a gun, asked him, "What did you do with the gun, Fred?" Petitioner responded, "I didn't have a gun. If I had one, I would probably have killed somebody tonight. Guns make me very nervous." (A. 244).

II. Saturday Morning, May 5, 1962—the Lineup.

The next morning Mr. Wong and Mr. Jow of Vince's Liquors, and Mr. Perry, George Griffith, and Robert Jones from Three Point Liquors were asked to view a lineup (A. 92, 111, 130, 168, 182). They each arrived separately at police headquarters and walked in a group to the City Hall jail about two blocks away where the lineup was held (A. 168-169). During the course of an elevator ride to the viewing room on the 14th floor, Mr. Perry remarked that if he "saw the guy again in the next hundred years, I would be able to identify him, because I got a good look at him" (A. 151-152).

At the viewing room each of the witnesses stood back and went one by one to view the lineup (A. 68, 139, 171). The lineup was held in an area outside the room and was visible to the viewer by looking through glass. (A. 139, 141, 171).

The witnesses were instructed "no talking" and apparently did not hear what the others said in the viewing room. (A. 68, 139-140). No photographs were shown to them prior to viewing the lineup, and apart from testimony showing that they were told to be careful to "pick the right one," no particular instructions were given (A. 89, 139). Each of the witnesses summoned that morning either positively identified petitioner (apparently No. 3 in the lineup) or stated that No. 3 resembled the robber.

First, Roger Wong of Vince's Liquors testified that before viewing the participants he was admonished to choose "the right one" and told that "there are quite a few people in there, a different bunch we can bring in . . ." (A. 92). Because he did not "want to pick out the wrong guy" and had to "live with his conscience" he studied "very hard" before he made his identification (A. 92). When he first viewed the lineup no one was wearing a hat and, although he knew petitioner without a hat, he wanted to make certain of his identification (A. 60, 70-72). Accordingly, he asked the inspector to have the men in the lineup wear hats and when they had done so he "picked No. 3" (A. 60, 69-72). After the lineup, he walked into the corridor area where he examined petitioner's right hand and observed a black spot on top (A. 59-60, 74).

Harry Jow stated that he identified petitioner as resembling "very likely the one that come and robbed us last night," but refused to make a positive identification because the glare of the glass affected his vision (A. 116). Thus, while he told the police that "that's the fellow out there. He looks like that is the fellow," he also said that, "I am not positively sure, because the light glares on the glass and that affects my vision" (A. 116).

Robert Perry (Three Point Liquors), was the first to view the lineup (A. 135). Once he saw petitioner through

the glass he knew him immediately. (A. 130, 140-141). He, like Mr. Wong, later walked back into the lineup area with one of the police inspectors and while "face to face" with petitioner said, he was the man who held him up. Petitioner said nothing in reply (A. 131-132).

George Griffith and Robert Jones, two customers at Three Point Liquors, also identified petitioner in the lineup after petitioner put on a hat (A. 170-171, 183).

III. The Trial.

Trial by jury was held within three months after the robberies had occurred, beginning on July 30, 1962 and continuing through August 7, 1962 (A. 26, 272). Although petitioner had been represented by the public defender at the preliminary hearing, he requested that the public defender be dismissed as counsel at trial and that private counsel be apointed (see *infra* 56). When informed that private counsel could not be appointed, but that services of the public defender would continue to be available, petitioner nevertheless insisted that he would proceed in "pro per" (see *infra* 56-57). After finally permitting petitioner to act as his own counsel, the Court nevertheless insisted that a member of the public defender's staff would have to be present to act in an advisory capacity to the petitioner (see *infra* 58-61). Accordingly, counsel who had represented petitioner at the preliminary hearing was present throughout the trial (see *infra* 56).

A. THE PROSECUTION'S CASE.

At the trial the first witness called was Inspector Gilbert Zweigle who identified a number of documents given to petitioner (A. 33-42). These included statements of the witnesses, and a statement of petitioner identified as such (A. 33-40). These documents which were identified for the

record as People's Exhibits 1-17, were never introduced into evidence.

The second witness, Mr. Phillip Smith of the District Attorney's Office, identified a photocopy of a portion of an original map located in the offices of the Oakland Street Department (A. 43-44). At one point in response to petitioner's questions, he testified that it took him "a couple of minutes" to drive from Linden Liquors (the third store) to Three Point Liquors (the second store) and that "walking quickly" it would take him "five to ten minutes" to cover that distance (A. 52). He also estimated that walking at a "moderate rate" it would "probably" take him five to six minutes to walk from Three Point Liquors (the second store) to Vince's Liquors (the first store); and "walking quickly" it would "probably" take him five to ten minutes to walk from Vince's Liquors (the first store) to Linden Liquors (the third store) (A. 53).

Thereafter, the main prosecution witnesses were called. Apart from the facts already set forth, their basic testimony was as follows:

1. Vince's Liquor Store: Roger Wong and Harry Jow.

Both Roger Wong and Harry Jow identified petitioner at trial as the person who attempted to rob them (A. 55, 109). Roger Wong testified that petitioner was wearing a dark sport coat, a dark hat, and a yellow sport shirt with little yellow flowers or "spots" making a "floral pattern" (A. 56, 63-64, 82, 86, 106-107). From his view at the counter, he did not "pay attention" to the trousers petitioner was wearing (A. 86-87).

In identifying petitioner in the lineup he studied the face and clothes (A. 69, 74). However, he indicated several times that it was the "face" which was the "important thing." Thus, he said, "Clothes they can always change . . . but the face they couldn't . . ." (A. 93, 100, 103-105).

In describing the face he testified that the robber did not have a beard, and he did not think there was hair on his lower lip (A. 90-91). However, he did have a mustache and a scar on the left side of his face, although he could not recall if he had reported these features to the police (A. 75, 94-96).

Mr. Wong insisted that he told the police that he had hit the petitioner on the hand, rather than the "hand or the arm" (A. 66-67, 77, 100), and that he "still" thought his description of petitioner as being 5'6" tall and weighing 150 to 160 pounds was a close estimate (A. 82-83, 104). Finally, Mr. Wong stated that before testifying, he had not read a transcript of the preliminary hearing, nor had he seen a photograph of petitioner (A. 86, 89, 99).

Harry Jow similarly identified petitioner at trial (A. 109) and stated that on the night of the attempted robbery he wore a hat, a dark gray sport coat and a yellowish shirt (A. 110, 117). He "didn't notice the trousers, because the counter was right in the way" (A. 120).

In response to petitioner's questions, he stated that petitioner did not have hair on his chin, nor did he have a goatee (A. 113-114). However, he did have a "little mustache, a shade of it," "little" whiskers around the bottom lower lip;" and a scar on the left side of the face which he may or may not have reported to the police (A. 112-114). Although he was not "very good at weight" he had described petitioner to the police as weighing "150 to 160" or "160 to 170" pounds and as five feet six or seven inches tall (A. 112, 119-120).

When asked why he had not positively identified petitioner at the lineup, he stated that the glass at the window affected his vision. However, when he saw petitioner "right here" with "no glass between us," he knew petitioner was the robber (A. 125).

Finally, Mr. Jow testified that he had not read any notes before the trial (A. 117). However, he had seen a photograph of the petitioner about a week before when an officer served him with a subpoena (A. 117-118, 120). At that time, the picture "refreshed his memory," but it did not help him "make up his mind" that petitioner was the robber (A. 118, 120-121).

2. Three Point Liquor Store: Robert Perry, George Griffith, and Robert Jones.

Robert Perry, who had identified petitioner at the lineup, similarly identified him at trial (A. 127). He was so close to petitioner that night that petitioner "could have reached over and kissed me if he wanted to" (A. 152). When asked what he particularly remembered about petitioner, he said that he would never forget his eyes (A. 131). He also had observed a scar or mark on the left side of petitioner's face and a slight mustache (A. 129, 131, 134). While he did not pay attention to petitioner's shirt, he noted that he was wearing a "sport hat" of "oxford gray or brown" color and "a sport coat with a little check pattern" (A. 127, 129, 133).

He also stated in response to petitioner's questioning that petitioner did not have "any kind" of bandage on his face, nor any "yellow marks," and that he did not know if petitioner had any "thick or heavy" grease (A. 137-138). The only photograph he saw of petitioner was in the courtroom when petitioner showed him one (A. 135), and he did not remember reading a transcript of the preliminary hearing (A. 136).

George Griffith, who had stood "right beside" petitioner in the store, also identified him at trial (A. 161-162, 164). The Three Point Liquor Store was a "small place," well-lighted, with a light "right at the door" (A. 176-177). He recalled that petitioner was wearing a gray striped coat, a "grayish" hat, with a "rag-looking band around it," and "a

yellowish-looking shirt" (A. 165-166). On the night of the robbery, he, too, had seen the scar on petitioner's face and had told the police about it (A. 165-166).

Mr. Griffith also testified that about three weeks before trial he saw a photograph of petitioner at the District Attorney's Office. However, the picture did not refresh his memory, since he just knew "it was you when he showed me the picture" (A. 173-174). Thus, he testified that when he was shown the picture he said, "yes, that's the guy that did the robbery" (A. 174).

Mr. Robert Jones, who had almost knocked petitioner down at the Three Point Liquor Store, also said that petitioner looked like the robber "but he didn't have on the same clothes he had" (A. 179, 180). Thus, he testified that petitioner had worn a little sport hat and a sport coat "lighter than his trousers was" (A. 179, 180). He saw only the right side of petitioner's face as petitioner looked "around" in his face at a distance of about 1½ feet (A. 179, 184). He did not see any scars or a goatee on the lower lip, but did see a "little mustache" (A. 180-181). About a week and a half prior to trial, he saw a photograph of petitioner (A. 181). In response to a question by petitioner, he said that the picture did not "freshen up" his memory of the person he saw in the lineup (A. 186,187).

3. Linden Liquors: Mr. William Pauletich.

Mr. Pauletich also identified petitioner at trial (A. 191). Although he had not noticed if petitioner had a mustache, it "looked like" there may have been hair on his lower lip (A. 197). Petitioner was wearing a sport coat and hat on the night of the robbery, and while he was not certain what kind of shirt petitioner was wearing, he thought that he might earlier have said that the shirt had a floral pattern or was a "flower-type" shirt (A. 197-198, 204). Mr. Pauletich did

not recall seeing a photograph of petitioner, nor had he read the transcript of his preliminary hearing testimony prior to trial (A. 204, 220).

The remaining prosecution witnesses were Sam Slaise (A. 220-225) and Officer Nielsen (A. 238-249), and Coatsie Smith, Jr. (A. 226-234), but their testimony is set forth for the main part elsewhere in this brief.

B. THE DEFENSE.

In his defense petitioner presented the testimony of five witnesses. They were:

1. Princess Nance, who testified that she paid petitioner $140 for labor performed on April 27-30 in two $20 bills and one $100 bill (A. 251-253). She admitted she had altered the date on the bill (A. 251-252).

2. Sarah Cunningham testified that she paid petitioner $3 on "May the 7th" for labor performed (A. 253-254).

3. Joe Pollard testified on direct examination that on "May the 30th" he paid petitioner $40 and that it "seems like there was one $20 bill involved" (A. 254-255).

4. Thelma O'Hara testified that on "May 3rd" she paid petitioner $12.50 for work performed (A. 257-258).

5. Officer Richard Ticksman testified that Mr. Wong reported he struck petitioner on the hand or arm. He did not recall if Mr. Wong reported a mustache (A. 259-260). Officer Ticksman testified that Mr. Pauletich had estimated that $175 to $200 was lost (A. 261-262). Officer Ticksman also stated that the reports reflected summaries of his conversations and that he did not give the reports to the parties to be signed (A. 261, 262).

Finally, it was stipulated that in a police report Mr. Perry estimated that the robber "got a little better than $70 to $80" (A. 262-263).

C. FINAL ARGUMENT AND INSTRUCTIONS.

1. The "Opening Argument on Behalf of the People."

The "opening argument on behalf of the people" was made on the afternoon of August 6, 1962 (A. 264-272). During the course of his argument the prosecutor outlined in some detail the evidence that had been presented. First he referred to the charges made and the basic facts with respect to each (A. 264-268).

He then stated that the "main issue" was one of identification and that there were "many factors in identification which may tend to improve the faults of the identification or to make it less good" (A. 268). He then listed these factors. First, he pointed out that there was a "good opportunity" to observe the robber; that this was not a case of "momentary identification" where "the witness might see a person for just a fraction of a second" (A. 268). "Another thing" was distance, and here he referred to the fact that the identification was not "from across the street" but from "just a few feet" (A. 269). The number of witnesses making the identification was a factor urged, as was the closeness of time in making the identification (A. 269). Thus, the district attorney argued that petitioner had been identified at Linden Liquors within half an hour after the robbery, and by other witnesses within twelve hours of the offenses at the lineup (A. 269). The prosecutor argued therefore that this "isn't the kind of case where, perhaps, the suspect isn't found for weeks or months, possibly, and then the witness has to remember from the time the thing happened a month or two later . . .," but rather, he said, "This is seeing the person the very next day when the face of the person would naturally be fresh in the witnesses' minds" (A. 269). The fact that the witnesses were not shown photographs prior to the lineup was also noted (A. 269).

The prosecutor also noted that the similarity in method by which the robberies were committed was a factor to be considered (A. 270), as was the fact that the robberies had occurred within a short period of time in approximately the same area. The fact that petitioner had $176 stuffed in various pockets, including some 30 $1 bills, was also drawn to the attention of the jury (A. 270).

Finally, the prosecutor said,

> "Now, another factor which I think you can consider in a case of this kind is the failure of the person charged to take the witness stand and testify in his own behalf.
>
> "I think you will be instructed on that by the Court, and I think the instruction is to the effect that if a person does not see fit, which he, of course, does not have to do, to take the witness stand to deny evidence that has been presented against him, that you, as the jury, may consider that that evidence may—you can take that failure to testify as indicating that the Defendant would be unable to deny it.
>
> "Well, at any rate, the instruction will be given to you on the person's failure to take the witness stand, and you will, I am sure, understand it and be able to apply that to this particular case." (A. 271).

2. The "Argument in Reply by Defendant."

The next morning the petitioner made his argument in reply (A. 272-292). He urged, as he had in his opening statement (A. 250), that the case was one of mistaken identification. Throughout his closing argument petitioner repeatedly made statements of a testimonial nature. Thus, he told the jury, inter alia, at the beginning of his argument that, ". . . the robber in this case is unknown to me, although I am accused of this particular crime which they said was committed . . . ." (A. 273). Referring to Wong's ability and opportunity to see and describe the robber's features petitioner stated "I wasn't there." (A. 277). Re-

ferring to Sobek's Liquor Store, petitioner testified, "I ain't never been in this store before," that he had been "by the store" and described the general area to the jury (A. 287).

After referring to asserted discrepancies by various witnesses, the petitioner stated:

> "Ladies and gentlemen, the State's Attorney commented on why the defendant in this case failed to take the stand.
>
> One reason I didn't take the stand, ladies and gentlemen, is that I didn't believe the State had proven its case.
>
> It hadn't introduced any evidence here to show that the defendant was the robber suspect, was the guy running around robbing those people. They haven't produced any evidence.
>
> They produced evidence that he looks like the man, he is similar, those clothes are similar. That is all the evidence they produced." (A. 288).

Referring to the occasion when he was brought back to Linden Liquors when he was identified by Pauletich, petitioner stated that he "saw the officer talk to Mr. Pauletich." (A. 289). He further stated, "I had on the same hat and coat which was in evidence. Mr. Pauletich walked around the defendant and looked at him and say, 'That looks like the man.'" (A. 289). When it was pointed out that Pauletich had stated "That is the man," petitioner replied "I am telling you what was said because I was there." (A. 289).

Finally at the conclusion of his argument petitioner stated "So that is all I can say in this particular case, that I didn't rob anyone." (A. 292).

3. The "Closing Argument on Behalf of the People."

In the "closing argument on behalf of the people" (A. 293-301), the prosecutor responded by attacking petitioner's

claim of that the witnesses were impeached impeachment. He stated that cousel had "gone to great lengths to bring out what might be call [sic] slight discrepancies in the testimony" (A. 293). He then proceeded to list some of these discrepancies.

For example, he noted that while Mr. Pauletich had estimated at trial that $165 was taken, counsel "brings out" that the amount stated on the police report was between $175 and $200. There was no evidence to suggest that Mr. Pauletich had signed the report, and, the prosecutor argued a witness might later have a more accurate idea of the amount of money lost than "five minutes or so" after the robbery occurred (A. 293).

Similarly while petitioner said that Mr. Wong described the shirt "at the preliminary" as a "flowered-type pattern," Mr. Wong also said "Well, that is what I mean," when shown the shirt at trial. This, the prosecution suggested was not a "real discrepancy at all" (A. 294).

The prosecutor argued, that as a matter of fact, it would be "remarkable" if all the witnesses "had exactly the same story," or if several people viewing a person "gave exactly the same description" (A. 293-294).

He turned to petitioner's charges of "coaching" and noted that this contention had to be viewed in context. Here he referred to the fact that there were a total of six witnesses who identified the petitioner at three different robberies. Furthermore, these witnesses had viewed a lineup the following day and identified petitioner without previously having seen pictures (A. 294-295).

He argued that the fact that counsel had "brought out" that some of the police reports did not have a mustache or scar as part of the description, was an "extremely immaterial point" since there was no evidence that the officer had asked about a scar and mustache. Furthermore, the prosecutor argued, "the fact that a complete, detailed, mi-

nute description does not appear on a police report does not mean that the witness didn't see what he says he saw" (A. 296).

Similarly, he noted that contrary to petitioner's argument, the witnesses didn't say, "it looks like the man," they said, "That is the man" (A. 296).

In reviewing the lineup evidence he argued that there was evidence to show that the witnesses were told not to talk when they went to view the lineup "one by one," and each said they made the identification themselves (A. 296). There was no evidence to indicate any encouragement of one witness by another (A. 296).

The prosecutor also argued that petitioner's statement that there was no evidence to show he was the robber was "rather remarkable" in view of the eyewitness and "considerable amount of circumstantial evidence" (A. 297). Thus, the prosecutor noted that petitioner had been described by two witnesses as "cool" and "calm," and the "modus operandi" was the same (A. 298). Indeed, the prosecutor argued, the modus operandi "tends to show the same person committed those three offenses" (A. 298). Thus, he stated:

> "If you had a case, for example, where you are satisfied that one identification of the person is good identification, the other identification may not be very good, but you are satisfied that each of the offenses were committed in exactly the same way, you could reasonably make an inference that the same person, if you are satisfied committed one of the offenses, committed the other ones, too." (A. 298).

The prosecutor also noted that petitioner's failure to respond to Mr. Perry's accusation at the lineup, and his similar failure in Coatsie Smith's store, was circumstantial evidence to be considered (A. 299). After also referring to the

31 $1 bills stuffed in the pockets which was "cumpled up", the prosecutor stated:

> "Now, also, the defendant here, as you know, has failed to testify in his own defense.
>
> "I think you will be instructed on that point that where there is evidence in the case that the defendant can reasonably be expected to deny or explain because of the facts within his knowledge, and he does not testify, the jury can consider that failure as tending to indicate the truth of such evidence, and as indicating that among the various inferences that you could draw from the evidence, those inferences unfavorable to the defendant are the most probable.
>
> "And you have that situation here." (A. 299-300).

The prosecutor then turned to the testimony offered by the defense witnesses, and stated that there was no evidence to indicate that the money petitioner earned was the same money he had in his possession. He said (A. 300):

> "So there isn't a particle of evidence in this case that the same money that the defendant earned was the same money that he had in his possession.
>
> "Actually, this happened right around the first of the month, and we don't know exactly what the defendant's circumstances are because he hasn't testified before you."

Finally, the prosecutor said:

> "He says why should he have to rob. Well, that is a question you could ask of many persons who commit robberies, who might very well be employed but still commit them." (A. 300).

Finally in closing the prosecutor said:

> "At any rate, I ask you when you consider this case to consider all the evidence very carefully, and I don't think you should consider any particular piece of evi-

dence in an isolated fashion, but you should consider all of the evidence together.

"And I know that when you do so in this case that you will bring in a proper verdict." (A. 301).

4. The Instructions.

In the course of the instructions, the trial court instructed the jury:

"If you should find from the evidence that there was an occasion when the defendant, under circumstances which fairly afforded him an opportunity to reply, failed to make denial in the face of an accusation expressed directly to him or in his presence charging him with a crime for which he is now on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstances of his silence and conduct may be considered against him as indicating an admission that the accusation thus made was true.

"Evidence of such an accusatory statement is not received for the purpose of receiving the truth but only to explain the conduct of the accused in the face of it.

"Unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement." (A. 305).

And, the Court instructed the jury that with respect to petitioner's failure to testify (A. 308-309):

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision.

"As to any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does

not testify, or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.

"In this connection, however, it should be noted that if a defendant does not have the knowledge that would be needed to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence.

"The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may chose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on the defendant's part will supply a failure of proof by the people so as to support by itself a finding against him on any such essential element."

V. Appellate Review of Petitioner's Conviction.

Following his conviction, petitioner filed an appeal with the Court of Appeal of the State of California, and counsel was appointed. After briefs were filed and oral argument heard, petitioner's conviction was affirmed by the Court on September 16, 1964 (A. 317-322). On November 10, 1964 the California Supreme Court denied a petition for hearing. On January 24, 1966, this Court in *Banks v. California,* 382 U.S. 420 (1966) reversed the decision of the Court of Appeal and remanded the case for further consideration in light of

Griffin v. California, 380 U.S. 609 (1965), which had been decided in the interim.

Following the remand, the Court of Appeal notified petitioner and his counsel that they could submit further written argument if they so desired (A. 326). Thereafter the petitioner requested the appointment of a second counsel on appeal on the ground that his appointed counsel failed to see constitutional errors on the original appeal (A. 327-328). The Court of Appeal replied that no different attorney would be appointed at this stage of the proceeding and observed that petitioner's present counsel could not have anticipated the decision in *Griffin v. California.* The court further advised counsel and the petitioner that the court would take *Griffin v. California* into consideration in deciding the appeal and that petitioner and counsel could submit supplemental briefs if they wished (A. 328-329). The petitioner filed a supplemental brief in pro per and respondent filed a letter (A. 330-331). On May 20, 1966 the Court of Appeal issued a new opinion reconsidering and reaffirming petitioner's conviction under the harmless error standard set forth in the California Constitution (A. 332-334). Petitioner did not file a petition for hearing in the California Supreme Court to seek review of the Court of Appeal's decision (See Certificate by Clerk of Court of Appeal.).

Thereafter, this case was again remanded by this Court in *Banks v. California,* 387 U.S. 92 (1967), for reconsideration in light of *Chapman v. California,* 386 U.S. 18 (1967), which had been decided in the interim. Following remand, petitioner again asked for the appointment of a different counsel on the previously-stated ground that his court-appointed counsel failed to see constitutional errors at the time of the original appeal (A. 335-336). The Court of Appeal notified petitioner's counsel that if he desired to

file a supplemental brief on petitioner's behalf he could do so (A. 337). Petitioner filed a supplemental brief in pro per (A. 338). Respondent did not file a supplemental brief (A. 339). On October 2, 1967 the Court of Appeal issued its third opinion in this case. The court concluded that, under the facts presented, the *Griffin* error in this case was harmless beyond a reasonable doubt under the standards set forth in *Chapman* (A. 341-342). Petitioner did not file a petition for hearing with the California Supreme Court to review the court's decision. (See Certificate by Clerk of Court of Appeal.)

ARGUMENT

I. This Court Lacks Jurisdiction Since the Judgment Sought to Be Reviewed Is Not by the Highest State Court.

The petitioner seeks review of a decision by the California Court of Appeal issued on October 2, 1967. He did not file a petition for hearing in the California Supreme Court for a hearing. (See Certificate by Clerk of Court of Appeal.) In his brief petitioner states: "Jurisdiction rests on section 1257 (3), Title 28, United States Code." (Petitioner's Brief, p. 3). Title 28, United States Code section 1257 restricts this Court's jurisdiction to review decisions of state courts to those causes wherein a judgment has been rendered "by the highest court of a state in which a decision could be had."

The judgment of an intermediate state appellate court is that of the highest court in which decision can be had if the state law makes its decision final and unreviewable. See *Talley v. California,* 362 U.S. 60, 62 (1960). The judgment of an intermediate appellate court is not a judgment of the highest court of the state in which a decision could be had where state procedure provides for discretionary review of the intermediate appellate court's judgment in a higher

state court and such discretionary review has not been sought. *Gorman v. Washington University,* 316 U.S. 98, *rehearing denied,* 316 U.S. 711 (1942); *McMaster v. Gould,* 276 U.S. 284 (1928); *Stratton v. Stratton,* 239 U.S. 55 (1915); *Mullen v. Western Union Beef Co.,* 173 U.S. 116 (1899).

Under California law the California Supreme Court has discretionary power to review all decisions of the Court of Appeal. The California Constitution, Article VI, section 12 provides:

> "The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction."

California Rules of Court, Rule 28(a), provides in part:

> "Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, . . ."

California Rules of Court, Rule 28(b), provides in part:

> "A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, . . ."

Thus, it is clear that the California Supreme Court had discretionary power to review the judgment of the Court of Appeal in the instant case.

Upon application to this Court for a review of the judgment of the state court it is the petitioner's burden to show affirmatively that this Court has jurisdiction. *Republic Gas Co. v. Oklahoma,* 334 U.S. 62, 71 (1948); *Memphis Gas Co.*

commit them." (RT 598).

you will bring in a proper verdict.

v. Beeler, 315 U.S. 649, 651 (1942). As the record fails to disclose that the judgment, review of which is now sought, is that of the highest court of the state in which a decision could be had, this Court is without jurisdiction and the writ must be dismissed.

II. The Comments on Petitioner's Failure to Testify Did Not Violate His Fifth Amendment Privilege and, in Any Event, Were Harmless Beyond a Reasonable Doubt.

At trial both the prosecutor and the judge commented upon the failure of petitioner to testify. Petitioner contends that such comment was error and was prejudicial. It is respondent's position that the comments, under the facts and circumstances of this case, did not violate petitioner's rights under the Fifth Amendment and that such comments were harmless beyond a reasonable doubt.

A. The COMMENTS WERE PROPER TO ANSWER PRO SE PETITIONER'S IMPROPER, UNPROVED STATEMENTS NOT UNDER OATH.

This case was tried prior to *Malloy v. Hogan,* 378 U.S. 1 (1964), which held the Fifth Amendment applicable to the states and *Griffin v. California,* 380 U.S. 609 (1965), which held the Fifth Amendment barred comment upon a defendant's failure to testify. The case was pending in this Court when *Griffin* was decided, so the error may still be raised. *O'Connor v. Ohio,* 385 U.S. 92 (1966). However, since the comments here were required to counter petitioner's misconduct in testifying during his cross-examination of prosecution witnesses and during his argument to the jury, there was no violation of the Fifth Amendment.

The privilege against self-incrimination may be waived; such waiver occurs when a defendant elects voluntarily to testify. *Caminetti v. United States,* 242 U.S. 470 (1917). In that case the defendant took the stand and testified as to only a portion of the prosecution's case. The trial court in-

formed the jury that, since the defendant had elected to testify, they could consider his failure to deny or explain acts of an incriminating nature that the evidence tended to establish against him in reaching their conclusion as to his guilt or innocence, *Id.* at 493. This Court upheld the instruction saying:

> "[W]here the accused takes the stand in his own behalf and voluntarily testifies for himself [citation omitted], he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it." *Id.* at 494.

See also *Johnson v. United States,* 318 U.S. 189, 196 (1943). Thus this Court has clearly held that a defendant who determines to answer part of the evidence is subject to comment as to the other evidence he does not meet. The instant case does not differ in any realistic way from *Caminetti,* for although there the defendant testified under oath, here Banks testified just as effectively by his statements during trial. Indeed, the only difference is that Banks avoided cross-examination.

Petitioner had been represented before trial by counsel and although he chose to try the case himself he consulted with counsel during trial. During trial he made his failure to take the stand a conspicuous fact that nothing could conceal. In cross-examining People's witnesses he made statements of factual claims which were simply his unsworn allegations. Under the guise of cross-examination petitioner testified concerning his weight (A. 82), that a witness never reported certain physical characteristics to the police (A. 96), to conditions of the lineup (A. 102), and during his opening statement he testified as to his residency (A. 250), and that he was mistakenly identified (A. 250).

The prosecutor understandably responded to petitioner's improper actions and the trial court necessarily informed petitioner and the jury that such statements should not be considered by them since no evidence had been introduced to support them (A. 82, 95, 102). The damaging fact that petitioner had not testified was therefore put before the jury by the petitioner's own improper conduct. Despite these warnings, however, petitioner also utilized his argument to improperly place before the jury the following matters:

"The robber in this case is unknown to me." (A. 273); "The defendant in this case is five ten and a half, ladies and gentlemen, and he weighs 180 pounds." (A. 275). Referring to the robbery of Vince's Liquor Store, petitioner said, "I wasn't there." (A. 277). Referring to Sobek's Liquor Store, petitioner testified, "I ain't never been in this store before." (A. 287). Disputing a prosecution witness' testimony, petitioner stated, "I am telling you what was said because I was there." (A. 289). Referring to an alleged statement made by him, petitioner stated, "He said he did not recall that statement, but they was made." (A. 290). Finally, at the conclusion of his argument petitioner stated, "So that is all I can say in this particular case, that I didn't rob anyone." (A. 292).

During his argument the petitioner informed the jury that he did not take the stand because the State had not proved its case since it had produced no evidence that he was the robber (A. 288). Although this remark was purportedly a response to the prosecutor's comment on his failure to testify, the explanation was in reality an attempt to justify and exculpate his own earlier improper conduct. During this colloquy the judge was required to instruct the jury that petitioner's unsworn assertions did not con-

stitute evidence and that he "can't give actually any facts except those that were given from the witness stand." (A. 290). Thus, the jury's attention was inevitably focused on the petitioner's right and failure to testify because of his decision to represent himself and try the case as he did. Indeed, the jury knew from the petitioner's statements that there was something he could say and tried to say but which they had to ignore for want of a verifying oath.

Although made during his cross-examination of witnesses and during argument rather than under oath and subject to cross-examination, petitioner's statements were clearly intended by him to be testimonial in character. Such conduct by a defendant representing himself has been held to warrant comment which calls attention to his failure to take the stand. Thus, it has been held that in a federal prosecution tactics such as employed by petitioner justify comment on the failure to testify. *Redfield v. United States,* 315 F.2d 76, 80 (9th Cir. 1963) (ruling on motion to set aside sentence); *Redfield v. United States,* 295 F.2d 249 (9th Cir. 1961), *cert. denied,* 369 U.S. 803 (1962) (ruling on direct review); *Smith v. United States,* 234 F.2d 385, 389 (5th Cir. 1956); *United States v. Yeager,* 285 F.Supp. 780 (D. N.J. 1968); *cf. United States v. Curtiss,* 330 F.2d 278 (2d Cir. 1964); see 38 Temple L.Q. 102 (1964) criticizing *Curtiss* and approving *Redfield.*

For example, in *Redfield,* the defendant persistently testified throughout trial although not under oath and he did so while purporting to act in the role of counsel and in flagrant disregard of repeated admonitions from the bench. The court there held that by such conduct the defendant waived his constitutional privilege against self-incrimination and that the privilege was not violated when the trial court subsequently advised him that he had the right to take

the witness stand, suggested that he take the witness stand, and cross-examined him.

Similarly, in *Smith v. United States,* 234 F.2d 385, 389 (5th Cir. 1956), the defendant, appearing pro se, argued with witnesses whom he was cross-examining. It was there held proper for the trial court to state " 'If you want the jury to consider what you have to say . . . you ought to testify . . . take the witness stand and testify and be subject to cross-examination. . . .' " *Id.* at 393.

In *United States v. Yeager,* 285 F.Supp. 780 (D. N.J. 1968), the prisoner did not testify in his own defense but in an attempt to establish that the rape victim was mistaken as to identification, the prisoner arose from his chair, walked around and stood before the jury next to a witness who claimed to have physical similarity to the prisoner. The court there held:

> "that where a defendant, while not actually assuming the stand and testifying during the course of the trial, indulges in demonstrative conduct which, in effect, puts into issue the truthfulness or correctness of the State's case against him, he thereby opens the door for *fair comment* by the trial judge and prosecutor under the *Caminetti* decision; and that the action of the defendant in this particular instance invited such comment by the trial judge, which comment was not unfair or unwarranted especially when a review of the transcript in the matter discloses that the defense counsel argued for three pages of the transcript regarding the identification of the defendant, Mitchell, and the defendant's witness, Forchion, and, in effect, was the first to comment upon the defendant's failure to take the stand." *Id.* at 783.

State courts have also held that when a defendant makes what are the equivalent of unsworn testimonial statements, his immunity from comment on the failure to testify is re-

linquished. *State v. Fioravanti,* 46 N.J. 109, 114-121, 215 A.2d 16, 18-23 (1965), *cert. denied,* 384 U.S. 919 (1966) (defendant waived rights under *Griffin* by voluntarily trying on pants allegedly seized from him, impliedly stating that his girth was unchanged and the pants were not his); *State v. Mayer,* 154 Wash. 667, 283 P. 195 (1929) (where defendant had a statutory right to an instruction that no inference was to be drawn from his failure to testify, the right was waived when defendant gave samples of his handwriting in the presence of the jury in order to prove that he had not written the draft of a telegram). See also *Machin v. State,* Fla., 213 S.2d 499 (1968).

To hold that petitioner's Fifth Amendment rights were violated in the instant case would extend to a defendant, acting as his own lawyer, an invitation to ignore the law and say as counsel things he could properly have said only if he testified in his own defense. To prohibit the prosecutor from commenting on such tactics and on the defendant's failure to take the stand and testify would confer upon such a defendant an improper advantage; one he could not have achieved had he been represented by counsel. This Court should not sanction such practice. It is submitted that under all of the facts and circumstances of the instant case, the comments on petitioner's failure to testify were proper and in no way violated his Fifth Amendment privilege.

B. THE COMMENT AND INSTRUCTION ON PETITIONER'S FAILURE TO TESTIFY WERE HARMLESS BEYOND A REASONABLE DOUBT.

The comment and instruction on petitioner's failure to testify were harmless beyond a reasonable doubt under the standard of *Chapman v. California,* 386 U.S. 18 (1967) where the court concluded that reversal of a conviction is not required if the reviewing court is able to declare a belief

that the comments were harmless beyond a reasonable doubt. *Chapman v. California, supra,* 24.

In the present case the Court of Appeal declared such a belief and its decision is amply supported by the record. For the facts demonstrate beyond a reasonable doubt that the comments did not contribute to the conviction. *Chapman v. California, supra,* 26.

At the outset it should be made clear that the comment made was totally unlike that made in *Chapman* where the prosecutor took full advantage of the defendant's failure to testify by "filling his argument to the jury from beginning to end with numerous references to silence and inferences of guilt." *Chapman v. California, supra,* 19. The comment made by the prosecutor here occurred but once in opening argument and twice in closing comments. Unlike the "machine gun repetition" of *Chapman,* petitioner's failure to testify here was not the point of emphasis. Further, although petitioner now objects to the trial court's instruction it was the petitioner who requested that the court give the instruction (A. 14).

As this court pointed out in *Griffin v. California,* 380 U.S. 609 (1965) it is necessary to distinguish the effect of the defendant's silence from the effect of the comment on that silence. This is particularly true in this case where during cross examination, opening statement, and oral arguments to the jury, petitioner insisted on testifying though not under oath, even after the trial court instructed the jury to disregard his unsworn testimony. Due to his misconduct the jury's attention was necessarily concentrated on the petitioner's failure to testify. The effect upon the jury of observing petitioner's misconduct during several days of trial was clearly overwhelming and negates any reasonable possibility that the comments might have contributed to the petitioner's conviction.

Moreover, when this case is viewed, as it must be, in light of the entire case presented to the jury, the conclusion may fairly be drawn that the comments did not contribute to the verdict rendered.[4]

First, that the crimes could easily be committed by one man acting alone within the distance and time period involved is not subject to doubt. Each of the four stores was located within approximately the same area, and each one was easily reached within the 50 to 60 minutes that petitioner took to range from place to place. Thus, even if the figures set forth by petitioner are used, it is shown that the first two stores were located roughly five and a half blocks apart; the second and third stores were approximately ten blocks apart (Petitioner's Brief 7, 9); while the last two stores were located approximately eight blocks apart (Petitioner's Brief 11).[5]

That the stores could easily be reached within the time period shown is established by the testimony of Phillip Smith. Thus, as he testified, "walking quickly" it would

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4. In resolving a question of harmless error, of course, only the evidence actually before the jury may be considered. See n. 3. In this connection it may be noted that the fact that the photocopy of the map on file with the Oakland Street Department (Plaintiff's Exhibit 28, R. 513), and petitioner's hat, coat, and shirt (Plaintiff's Exhibits 20, 21, 22; R. 514) are no longer available, is irrelevant to the decision to be made in this case. It is highly unlikely that the Street Department map was in any way misleading and the relative distances between the stores is preserved by the testimony of Phillip Smith. Similarly, the appearance of the clothing is preserved by the defendant's exhibits.

Apparently all exhibits were removed from the Superior Court file in April 1966 (Pet. Br. 38). In the interval since the case had been tried in 1962, however, the conviction had become final in California in 1964 and it was not until January 1966 that petitioner's first petition for writ of certiorari was acted upon.

5. For the Court's convenience we have attached the pages from the "Alameda County Popular Street Atlas" (1961) prepared by Thomas Bros. Maps, which shows the various streets to which reference is made.

take him "five to ten minutes" to walk from Linden Liquors (the third store) to Three Point Liquors (the second store) (A. 52); walking at a "moderate rate" it would "probably" take him five to six minutes to walk from Three Point Liquors (the second store) to Vince's Liquors (the first store); and "walking quickly" it would "probably" take him five to ten minutes to walk from Vince's Liquors (the first store) to Linden Liquors (the third store) (A. 53).

The veracity and accuracy of the eyewitness testimony is similarly not open to doubt. Thus, while it may be true as petitioner suggests, that the demeanor of the witnesses cannot be presented to this court sitting in an appellate reviewing capacity (Petitioner's Brief 69), their candor and honesty clearly emerges from the record. Similarly, their lack of motivation to lie or to "hedge" about the truth is apparent.

Thus, this case is totally unlike *Anderson v. Nelson,* 390 U.S. 523 (1968) where the veracity of the main prosecution witness was subject to doubt. Similarly, it is unlike *Fontaine v. California,* 390 U.S. 593 (1968) cited by petitioner (Petitioner's Brief 63), wherein the informant involved in the narcotics sale was missing. In the present case all of the critical witnesses were present.

None of the factors usually thought to contribute to mistake is presented by this case. Thus, the testimony clearly established that the witnesses had ample time and opportunity to view petitioner. At Vince's Liquors Roger Wong saw petitioner, reached over and hit him on the hand with a gun, while Harry Jow stood across the counter from him at a distance of about 2½ to 3 feet away (A. 57, 118). At Three Point Liquors the robber was so close to Perry that he could have reached over and "kissed him" while Griffith stood right beside him and Jones almost knocked

him down (A. 152, 164). At Linden Liquors William Pauletich and the petitioner stood and looked at each other "kind of hesitating" for awhile (A. 191). And although petitioner also states that the victims were "excited" the record suggests that that very fact may have tended to create a lasting impression. Perry, for example, stated that he would not forget the robber if he saw him again in a hundred years (A. 151-152). Jow stated that he could not forget someone who pointed a gun at him, or what he thought was a gun (A. 124). Wong, too, expressed a similar feeling (A. 95, 104).

Furthermore, the fact that the witnesses identified petitioner so quickly after the event belies an assertion of mistaken identification. Mr. Pauletich, for example, identified petitioner within half an hour after the robbery at a time when he would be particularly eager to have the police apprehend the right man, while there was still opportunity to do so. The other five witnesses from the other two stores identified petitioner within the next twelve hours. As we show below, the identification procedures used were fairly conducted, and no suggestion to identify petitioner occurred. Furthermore the trial itself at which petitioner was again identified, was held within three months after the robbery, at a time when there would be little or no opportunity for memories to fade.

Petitioner captiously seizes upon some asserted discrepancies to urge that the identifications were subject to doubt. When these discrepancies are analyzed, however, their *de minimis* nature is clearly appreciated. Thus, by reference to pages 33 to 35 of his brief, petitioner first asserts that, "There was no agreement from the testimony, on the robber's face." He then points to purported discrepancies concerning the descriptions given about the scar,

the mustache, and the hair underneath petitioner's lower lip. Nevertheless, at the trial five of the witnesses testified that they saw a scar on petitioner's face (Wong, Jow, Perry, Griffith, and Pauletich); and four testified that they saw the hairline mustache on petitioner's face (Wong, Jow, Perry, and Jones). While only two of the witnesses (Jow and Pauletich) apparently saw the few hairs underneath petitioner's lower lip, that is scarcely surprising if defendant's Exhibit A, is an accurate reflection of what he looked like at the time (see supra, pp. 1-8, 11-15).

Continuing on, at pages 35-37 of his brief, petitioner contends that there was "no agreement on the robber's clothing." Thus, despite the fact that all the witnesses agreed that petitioner was wearing a hat and coat, their identification is questioned because they describe the hat in various ways as, for example, "dark" or "oxford gray or brown," or, similarly for describing the outer garment as a "sports-type coat" or "sports coat" or "sports jacket." In similar vein the witnesses are faulted either for not being able to remember or describe the shirt, or for being able to describe it only as "yellowish" or "yellow" with "flowers" or "dots." The utter insignificance of such minor discrepancies as these seems clear. Indeed, if their testimony had been too "pat" it would be questioned.

Moreover, apart from the eyewitness testimony itself, the record establishes a number of corroborating factors. Thus, Roger Wong who hit the robber on the right hand with his gun, later saw a black spot on petitioner's right hand after he had identified him in the lineup. William Pauletich's mother gave the robber 30 to 40 $1 bills, and 31 $1 bills were later found on petitioner's person. Similarly, when Officer Nielsen asked him about the gun, petitioner replied, "I didn't have a gun. If I had one, I would probably

have killed somebody tonight. Guns make me very nervous." (A. 244).

In reaching its verdict the jury would have considered, of course, the defense put forward by the petitioner. But this defense can only be classified as weak at best. Thus, two of the witnesses' testimony was clearly insignificant (Sarah Cunningham and Thelma O'Hara), while the other witnesses were incorrect or confused about dates.

When all of the evidence before the jury is considered therefore it seems clear beyond a reasonable doubt that neither the comment nor the instruction could have contributed to petitioner's conviction. Under these circumstances therefore the Court of Appeal properly concluded that the comments were harmless beyond a reasonable doubt.

III. Petitioner May Not Now Raise Any Alleged Error Regarding the Use at Trial of His Silence in Face of Accusations.

Petitioner contends that it was error to use petitioner's silence in the face of accusations as evidence of guilt. However, there are two separate and independent grounds why this contention is not properly before this Court.

A. PETITIONER CANNOT RAISE A QUESTION WHICH WAS NOT CONTAINED IN THE PETITION FOR CERTIORARI.

In his petition for certiorari the only question presented by petitioner was whether the Court of Appeal had carried out the mandate of this Court in applying the *Chapman* standard. The petitioner later filed "an application for a writ of habeas corpus as a supplement to the application for a writ of certiorari." The question presented in that document was whether the trial court had lost jurisdiction by failing to protect petitioner's constitutional rights. Petitioner argued (p. 7) that since the District Court of Appeal

found that the trial court violated petitioner's constitutional rights by commenting and instructing on defendant's failure to testify, the trial court by failing to protect petitioner's constitutional rights lost jurisdiction to proceed to judgment. Thus, it is clear that the question of the use of petitioner's silence, in the face of accusation, as evidence of guilt was not raised in the questions presented.

Supreme Court Rule 23(1)(c) provides that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." The rule has been uniformly invoked when the petitioner's brief presents questions not raised in the petition. *Namet v. United States,* 373 U.S. 179, 190 (1963); *Phillips Co. v. Dumas School Dist.,* 361 U.S. 376, n. 12 at 387 (1960); *Carpenters' Union v. Labor Board,* 357 U.S. 93, n. 1 at 96 (1958); *Lawn v. United States,* 355 U.S. 339, n. 16 at 363 (1958); *Irvine v. California,* 347 U.S. 128, 129 (1954).

Petitioner attempts to evade the requirements of Rule 23(1)(c) by claiming that the question was raised in the "Statement of the Case" portion of his "application for a writ of habeas corpus as a supplement to the application for a writ of certiorari" (p. 6). Preceding the questions presented petitioner set forth a statement of the case which sets forth a variety of trial court proceedings including the statement that the trial court instructed on admissions by silence and that the district attorney commented thereon.

Certainly a petitioner cannot be permitted to raise various claims of error merely by giving a detailed statement of the case especially when the question raised was limited to the question of the *Griffin* error and the *Chapman* application. Such a practice conforms neither to the letter nor the spirit of Rule 23. A petitioner must be limited to those issues arising out of the questions presented in his petition, as those questions are framed through the arguments made

in support of that petition under Rule 23(1)(h). In *Irvine v. California,* 347 U.S. 128, 129 (1954), this Court declared, "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition . . . ." Since petitioner now attempts the same maneuver condemned in *Irvine,* he should be similarly limited to those questions actually raised in his petition for certiorari and this Court should decline consideration of the question of the use of defendant's silence in the face of accusation.

B. THIS COURT'S RULING IN MIRANDA THAT A DEFENDANT'S SILENCE IN THE FACE OF ACCUSATION MAY NOT BE USED AT TRIAL CANNOT BE RETROACTIVELY APPLIED TO THE INSTANT CASE.

Petitioner contends that it was error to use petitioner's silence in the face of accusations as adoptive admissions of guilt at his trial. This Court has already held that the prosecution may not use the fact that a defendant stood mute in the face of accusation. Footnote 37, at page 468 of *Miranda v. Arizona,* 384 U.S. 436 (1966), reads in part as follows:

> "In accord with our decision today it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. Griffin v California, 380 US 609, 14 L ed 2d 106, 85 S Ct 1229 (1965); Malloy v Hogan, 378 US 1, 8, 12 L ed 2d 653, 659, 84 S Ct 1489 (1964); Comment, 31 U Chi L Rev 556 (1964); Developments in the Law—Confessions, 79 Harv L Rev 935, 1041-1044 (1966). See also Bram v United States, 168 US 532, 562, 42 L ed 568, 580, 18 S Ct 183 (1897)."

It is apparent by a reference to the relevant text of the *Miranda* opinion which discusses the coercive evils of interrogation of a suspect, including the dilemma posed

by silence in the face of accusations and also the precise language that the footnote is considered a part of the holding in *Miranda.*

In *Johnson v. New Jersey,* this Court expressly declared that "*Miranda* applies only to cases in which the trial began after the date of our decision one week ago." 384 U.S. 719, 721 (1966). Petitioner's trial commenced on July 30, 1962 almost four years prior to June 13, 1966, the date of the *Miranda* decision.

In a *per curiam* opinion the Ninth Circuit Court of Appeals specifically held that *Johnson v. New Jersey* is applicable to this Court's ruling that the prosecution may not use at trial the fact that defendant stood mute in the face of an accusation and that therefore such ruling could not be retroactively applied to trials commenced prior to the date of the *Miranda* opinion. *Wilson v. Madigan,* 389 F.2d 97 (9th Cir. 1968).

It is therefore submitted that *Johnson v. New Jersey,* 384 U.S. 719 (1966), is applicable and that this Court's holding in *Miranda,* that is, that the silence of a defendant in the face of accusations cannot be used against him, is not retroactive to the instant case.

IV. Neither the Lineup nor the Other Identification Procedures Used Were So Suggestive or Conducive to Irreparable Mistaken Identification as to Constitute a Denial of Due Process.

Petitioner asserts that due process was violated on three occasions by the pretrial identification procedures used either by the police or the Office of the District Attorney, and that these procedures tainted the later identifications made at trial.

A. PETITIONER CANNOT PRESENT A QUESTION WHICH WAS NOT RAISED IN THE PETITION FOR WRIT OF CERTIORARI.

In argument III, page 39, respondent set forth Supreme Court Rule 23(1) (c) and the decisions of this Court which

state that only questions set forth in the petition or fairly comprised therein will be considered by this Court. The instant petition does not raise nor even allude to the question of the fairness of lineup procedures. Since the question was not raised in the petition of this Court should decline consideration of that issue.

B. THE LINEUP AND THE OTHER IDENTIFICATION PROCEDURES DID NOT CONSTITUTE A DENIAL OF DUE PROCESS.

Seeking to bring this case within the scope of several recent decisions of this Court, petitioner contends that due process was violated: (1) when he was taken back to Linden Liquors the night of the robbery where Mr. Pauletich identified him as the robber; (2) when he was placed in the lineup the next morning; and (3) when photographs of him were shown to three of the witnesses after the lineup but before the trial. A review of the record demonstrates that each is totally without merit and that petitioner cannot prevail on a due process claim.

In making each of these contentions, of course, petitioner seeks to bring his case within that line of cases beginning with *United States v. Wade,* 388 U.S. 218 (1967), holding that a post-indictment lineup is a critical stage of the prosecution at which a defendant is entitled to the aid of counsel. See also *Gilbert v. California,* 388 U.S. 263 (1967). While petitioner does not here claim a right to counsel here in view of *Stovall v. Denno,* 388 U.S. 293 (1967), limiting the *Wade* and *Gilbert* rules to future cases arising after the date of these decisions, June 12, 1967, apparently he does claim that the due process standards set forth in *Stovall* are applicable here. Thus, in *Stovall v. Denno, supra,* which involved a collateral attack on a post-indictment but pretrial identification procedure used, the Court in setting forth the test to be applied to lineup cases tried before *Wade,* said:

> "We turn now to the question whether petitioner, although not entitled to the application of *Wade* and *Gilbert* to his case, is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. Palmer v. Peyton, 359 F.2d 199. . . . However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it. . . ." (388 U.S. at pages 301-302 footnote omitted.)

That the question of unfairness depends upon the totality of circumstances presented has been reaffirmed in *Simmons v. United States,* 390 U.S. 377 (1968), (dealing with the pretrial use of photographs). Petitioner must establish that the confrontation resulted in such unfairness and that under the circumstances it infringed upon his right to due process of law. *Stovall v. Denno,* 383 U.S. 293, 299 (1967). Petitioner cannot demonstrate here, however, that any of the pretrial identification procedures used, "resulted in such unfairness that it infringed his right to due process of law," *Stovall v. Denno, supra,* 388 U.S. 293, 299. We deal below with each contention seriatim.

1. The Identification by Pauletich.

The record shows that immediately after each robbery or attempted robbery, the police were called and descriptions of the robber given. These descriptions were conveyed to Officer Nielsen and led him to believe that the same person was involved in all three liquor store robberies. These descriptions coupled with petitioner's statement to Coatsie Smith that "I might want to hold you up" led to

his arrest at Sobek's Liquors (A 228). Officer Nielsen then took petitioner to the closest store (Pauletich's) to determine if petitioner was in fact the one who had committed the robberies. By taking him there, Officer Nielsen could determine if he had arrested the right man or if, on the contrary, petitioner should be released and the search continued.

Once inside the store, the police did not indicate or suggest to Pauletich that he should identify the petitioner as the robber. Pauletich did not converse with the police officers prior to his identification (A 200). The officers asked Pauletich if petitioner was the robber. After coming closer to the petitioner "so I could see better," Pauletich told the officers "that is the man." (A 199).

Petitioner contends that the identification by Pauletich was unfair because he was the only suspect present. Although a situation in which a suspect is placed in the position of being the only person to be identified is potentially unfair (*United States v. Wade,* 388 U.S. 218 (1967); *Gilbert v. California,* 388 U.S. 263, 302 (1967)), one in which the "totality of the circumstances surrounding" the confrontation demonstrates that the identification was valid provides no denial of due process. In *Stovall* this Court upheld a single confrontation because the condition of the victim witness made an immediate confrontation advisable.

This case presents another situation where a single confrontation was warranted. Prompt identification of a suspect who has been apprehended close to the time and place of the offense assists the police in not only finding the culprit but also helps to protect the innocent. The propriety of an immediate confrontation with the victim has been the subject of recent judicial comment.

> "No principle of justice rooted in our traditions and conscience as a people is offended by the course which

was followed in this case. It would be ridiculous to contend that under the circumstances the police should have gone out and brought in a number of persons, placed appellant with them and then said in effect to the victim 'Which one participated in the burglary?' We are not persuaded that we should declare a confrontation objectionable solely because the suspect was viewed with a policeman by the victim. To do so would cancel a police investigative tool which if effectively used aids in quickly exonerating the innocent and discovering the guilty," *People v. Romero,* 263 A.C.A. 651, 655, 69 Cal.Rptr. 748 (1968).

Petitioner contends that "the showup produced an identification of a man who did not fit the description of the robber Pauletich had given the investigating officers minutes before." (Petitioner's Brief, p. 80). The record refutes this contention.

Pauletich told the officers the robber "was a fellow about my size" which petitioner on cross-examination established as 5'8" tall and 160-165 pounds (A 195, 198). In this connection petitioner states that the robber of the Pauletich store was described to the reporting officers as 5'9" to 5'10" tall, 170 pounds, and 40-50 years old (Petitioner's Brief, p. 11). Petitioner "testified" without benefit of oath or cross-examination that he was 5'10" tall and weighed 180 pounds (A 275). Certainly a possible two-inch difference in height and 15 pounds weight difference is not significant. When the police arrived at Pauletich's store immediately after the third robbery, they needed an immediate general description in an effort to apprehend the robber who was still engaged in a one-man crime wave. As Pauletich stated in his testimony the police at that time "wanted a more or less closer description, whether he was six-foot or whether he was five-six." (A 198).

Although he did not notice a hairline moustache, Pauletich told the officers that the robber had a scar on his face (A 195-196), that the robber wore a sportcoat (A 194-198), a hat and a floral shirt (A 198), and that he was unable to see the robber's trousers because the counter blocked his view (A 195). Thus the characteristics of the petitioner were remarkably similar to Pauletich's observations regarding the robber.

Petitioner criticizes the following factors as being unduly suggestive: (1) The suspect and the victim were of a different race; (2) the identification occurred at night; (3) the victim of the robbery was emotionally involved (A 79). If these factors are impermissibly suggestive, then it means that a person of one race may not validly identify a suspect of another race, that a victim may not validly identify a suspect (apparently only disinterested automatons may qualify), and that valid identifications may occur only in broad daylight. Thus petitioner's contention would nearly nullify all identification because of factors occurring at the time of the crime. Certainly the due process clause of the Constitution cannot be interpreted to prevent all identifications of suspects.

The very promptitude with which the police acted promoted reliability. Within a half-hour Pauletich saw Banks at his store and positively identified him as the robber. The robber's appearance was fresh in the victim's mind. Pauletich had sufficient opportunity to observe petitioner in a well-lighted store during the robbery. Certainly the fact that petitioner was wearing clothes similar to the clothes the robber was wearing one-half hour earlier cannot be deemed unfair unless the police are to be required to keep a wardrobe in the squad car. Further, unlike the lineup described in *Gilbert v. California,* 388 U.S. 263, 270, fn. 2,

petitioner was not compelled to put on certain articles of clothing. Rather he was viewed in the clothing he was wearing at the time of his arrest.

Finally, petitioner contends that the identification by Pauletich was a wholly unnecessary procedure (Petitioner's Brief, p. 80). In the instant case the immediate identification by Pauletich was necessary in order that the police could determine if the suspect was the robber. If not they could immediately continue their search for the robber and perhaps prevent the commission of additional robberies.

Thus, the California Supreme Court has encouraged police officers promptly to return the suspect to the scene of the crime for identification purposes. *People v. Mickelson,* 59 Cal.2d 448, 454, 30 Cal.Rptr. 18 (1963).

In this regard the Court of Appeals for the District of Columbia has ruled:

> "Here was a confrontation proximate to the scene and time of the offense as well as the apprehension, where the observers and actors were limited to those that were in fact present at the scene and time of the offense and the chase. Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability, and are not inherently a denial of fairness. * * * [We] do not consider a prompt identification of a suspect close to the time and place of an offense to diverge from the rudiments of fair play that govern the due balance of pertinent interests that suspects be treated fairly while the state pursues its responsibility of apprehending criminals." *Wise v. United States,* 383 F.2d 206, 209-210 (D.C. Cir.), *cert. denied,* 390 U.S. 964 (1967). See also *Kennedy v. United States,* 353 F.2d 462 (D.C. Cir. 1965).

Thus it is clear that considering the totality of circumstances surrounding the confrontation, the identification by Pauletich was proper and fair.

2. The Lineup.

Petitioner's further contention that the lineup was conducted in an unduly suggestive manner is similarly devoid of merit. Indeed, viewed "in the light of the totality of surrounding circumstances," *Stovall v. Denno, supra,* the claim is untenable.

The record discloses that petitioner was placed in a lineup the morning of his arrest and following his identification by Mr. Pauletich. Since he fit the description of the robber of the other two stores, Wong and Jow from Vince's Liquors, and Perry, Griffith, and Jones from Three Point Liquors were asked to view a lineup. In asking the victims to come to the station to view the lineup, the police in no way suggested that petitioner was the suspect. Wong, for example, specifically was told that there might be a couple of lineups (A. 92). Thus this case at the outset does not present the type of suggestive procedure described in *United States v. Wade, supra,* 233 wherein the victim sees only the suspect or the suspect is otherwise pointed out.

In the lineup room the witnesses were told to go to the back of the room and "no talking" (A. 139). Each of the witnesses went one at a time to view the lineup, and no one heard what, if any, identification the others made in the viewing room. Perry happened to be the first to view the lineup, but there is nothing to suggest, as petitioner does, that it was because he was "impatient" much less that this "impatience" was "communicated" to the other witnesses. Similarly, the record in no way suggests "hostility."

The lineup itself was held in an area outside the viewing room and was viewed by looking through glass. Consequently, there could be nothing suggestive in the police telling the witnesses to look straight out through the glass (Petitioner's Brief 83). Similarly, since the entire lineup could

be viewed by looking through the glass, there could be nothing suggestive in the fact that petitioner stood in the middle rather than at some other place. The lack of suggestion is further established by the fact that on either side of petitioner stood two other Negro males, or a total of five Negro males, all of similar height and weight. None of the participants were "grossly dissimilar" as stated in *United States v. Wade, supra,* 233, nor was the lineup in any way similar to that recently condemned in *People v. Caruso* 68 Cal.2d 183, 436 P.2d 336 (1968), wherein the defendant was 6 feet 1 inch, weighed 238, was of Italian descent with dark complexion and dark wavy hair, while all the other members resembled him neither in size, complexion or hair.

While from Defendant's Exhibit "B" petitioner seizes upon the age of the participants as a distinguishing and suggestive feature, urging that the others were younger (Petitioner's Brief 83-84), an examination of the photograph of the lineup participants reveals that apart from the man on the far left, all of the men were of approximately the same age. Furthermore, it otherwise appears from the record that petitioner's appearance in age may, in fact, have been deceptive. Thus, at one point prior to trial, when petitioner said he was 48, the judge expressed surprise and exclaimed, "By George, you are a young looking man for 48" (R. 42). While Wong apparently always considered petitioner to be 50, he also thought a man standing close to the wall was 50, too (A. 102).

Of the clothing worn by the participants, three wore jackets. Petitioner, of course, wore the clothing that he had on when arrested and about which there was nothing unusual. This is not a case therefore where petitioner was required to put on distinctive clothing.

Similarly, while Defendant's Exhibit "B" shows only petitioner standing with his hat in front of him, during the

lineup itself it appears that the others wore hats, too. Thus, Wong, for example, testified that at first all of the men were without hats, and he then recognized petitioner. However, he wanted to make sure of his identification, and at his request all of the men wore hats (A. 60, 69-72). When Jones first saw petitioner he was without a hat, but then because he, too, "wanted to identify him just like he was when I saw him coming out of the store," petitioner wore a hat (A. 183). When Griffith first saw the lineup all the men were bareheaded. Petitioner then put on a hat (A. 170). At the lineup, of course, all the witnesses made a positive identification of petitioner (see supra, 9-11).

In the totality of the surrounding circumstances, therefore, there was nothing suggestive about the way in which the lineup was conducted or which would lead to a mistaken identification. None of the suggestive procedures set forth in *Wade,* for example, were present. Thus, apart from the other points already noted, this is not a case when all the members in the lineup but the suspect was known to the witnesses, or a case where the suspect was pointed out before or during the lineup, or where, for example, the participants were asked to put on clothing which fit only the suspect. *United States v. Wade, supra,* 233.

Assuming arguendo, however, that there was some way in which the lineup was conducted that fell short of due process—a claim which we believe cannot be maintained—there is no showing that the lineup "tainted" the later identification made at trial. Thus, in considering in order the factors outlined in *Wade, supra,* 241, as noted throughout this brief, each of the witnesses had ample opportunity to view the petitioner at close distance and in a well lighted store.

Similarly, there were no discrepancies between the pre-lineup descriptions given and the identifications made at

the trial. While petitioner refers to a number of police reports which the evidence clearly shows were never shown to or signed by the witnesses, these reports in fact substantiate the identifications made by the witnesses. The weakness of petitioner's case in this respect is demonstrated by the examples of alleged discrepancies he lists. Thus, for example, he notes that the report for the robbery of Perry listed a "small scar left side of mouth" as contrasted with "the large, pronounced scar above petitioner's lip"—a matter which clearly is one of opinion. In similar vein petitioner says the report lists the robber's hat as "brown" but petitioner's hat was black (Petitioner's Brief 86). The *de minimis* value of this kind of discrepancy is readily apparent. If one continues on, the greatest discrepancy asserted is between Perry's description of petitioner as "cool" whereas the unsigned report said "nervous." However, cool is the way in which Perry described petitioner at trial and the preliminary hearing.

Indeed, when the consistencies between the reports and the testimony are considered, the comparison is striking. At no time did the witnesses describe petitioner other than what he was, nor did they identify any other person to be the robber. There were no pictures shown to the witnesses prior to the lineup, nor was there any failure to identify the petitioner on a prior occasion. Thus, this case is totally unlike the lineup described in n.16 of this Court's opinion in *Bumper v. State of North Carolina,* 391 U.S. 543 (1968), where the witnesses initially identified someone who was not the petitioner.

Indeed, when all the evidence is considered it must be concluded that petitioner was not deprived of due process in the conduct of the lineup, nor was there a mistaken identification made. The witnesses consistently identified

the petitioner from the inception, continuing through the preliminary hearing and the trial itself. If doubt existed as to petitioner's identification, it was not in the minds of the witnesses.

3. The Showing of the Photographs.

Finally petitioner contends that the showing of a photograph to each of three witnesses, Jow, Griffith and Jones, prior to trial constituted a denial of due process. However, the witnesses' observation of his photograph must be examined in light of the prior identification of petitioner by each of the three witnesses.

Thus, Jow was present at the lineup and informed the officers "that is the fellow out there. He looks like that is the fellow." (A 116). That Banks "is the very person. He looks exactly like the fellow that came and robbed the store." (A 117). But he was not "positively sure, because the light glares on the glass and that affects my vision." (A 116).

Jow testified that a police officer showed him a picture of petitioner at the time he served a subpoena a few weeks before trial (A 117, 122). After stating that the picture refreshed his memory (A 118), he testified that the picture did not help make up his mind in identifying the suspect (A 120). He further testified that the photograph "does not help me. It don't have to be refreshed. When a person points a gun at you at about three feet, you will remember it" (A 124). When asked if he would have been so sure in his identification without the photograph Jow replied, "After I see you, I am positively sure." (A 126).

Mr. George Griffith identified Banks as the robber of the Three-Point Liquor Store at the time of the lineup. Griffith testified that he looked at the five men in the lineup and, referring to Banks, stated: "That is the guy right there."

(A 170). After Banks put his hat on Griffith repeated his identification (A 170).

On the day trial was originally scheduled to commence (July 16th) Griffith appeared in the district attorney's office pursuant to a subpoena and was shown a photograph of Banks (A 173). At trial when petitioner asked if the photograph refreshed his memory of the robber Griffith replied, "No, I seen your face. No, it didn't refresh my memory as to no robbery. I just know it was you when he showed me the picture." (A 174).

Mr. Robert Jones also identified Banks as the robber of the Three-Point Liquor Store at the lineup held on May 5, 1962 (A 183). At the lineup Jones told the officer he would be able to make a better identification with a hat on because that was the way he had seen the robber (A 186). After the officer had the suspects put their hats on Jones identified Banks as the robber (A 186).

Griffith was shown a photograph of Banks two weeks prior to trial at the time trial was then set to commence (A 181). When asked about the photograph Griffith replied, "No, it didn't refresh my recollection, not at all." (A 187). He further testified that he would have been able to identify Banks without the aid of the photograph (A 187).

Thus, the record demonstrates that each of the witnesses shown petitioner's photograph had previously made an identification of petitioner long before they even saw his photograph. Thus this Court's holding in *Simmons v. United States,* 390 U.S. 377 (1968), has no bearing on the instant case. In that case after discussing the advantages and dangers of initial identification by photographs this Court applied the standard set forth in *Stovall,* that is, whether the photographic identification procedure was so impermissibly suggestive as to give rise of a very substan-

tial likelihood of irreparable misidentification. In *Simmons* this Court was concerned with "the hazards of *initial identification* by photograph." (Emphasis added.) *Id.* at 384. Here the showing of the photograph was not the initial identification of petitioner but rather occurred months after the lineup when each of the witnesses had identified the petitioner as the robber of the respective stores.

Furthermore, even where the initial identification is by photograph this Court determined in *Simmons* that such procedure did not violate due process because of certain factors there present including the fact that the robbery took place in a well-lighted bank, that the robbers wore no mask, that the witnesses were able to plainly see the person identified as the robber for periods up to five minutes, and the fact that the witnesses, notwithstanding vigorous cross-examination, entertained no doubt about the validity of their identifications. In the present case the robberies took place in well-lighted stores, the robber exposed his features without even wearing a mask or dark glasses to hide his features, the witnesses had an adequate opportunity to view the robber, and at trial none of the witnesses displayed any doubt about their respective identifications of Banks.

Finally, the record is clear and convincing that the in-court identification by each of the three witnesses was not based on their view of the photograph but rather was based solely on their independent observation of petitioner at the scenes of the robberies. Thus, each witness stated that the photograph did not help in identifying the suspect but rather that the identification was based on recollections at the time of the robbery.

For all of the aforementioned reasons it is submitted that the display of petitioner's photograph to the three witnesses at the time they were served subpoenas did not constitute a denial of due process.

V. Petitioner Was Not Denied His Right to Counsel at Trial or on Appeal.

A. PETITIONER CANNOT PRESENT A QUESTION WHICH WAS NOT RAISED IN THE PETITION FOR CERTIORARI.

In Argument III, page 39, respondent set forth Supreme Court Rule 23(1)(c) and the uniform case law which holds that only questions set forth in the petition or fairly comprised therein will be considered by this Court. The instant petition does not raise nor even allude to the question of denial of counsel at trial. Since the question was not raised in the petition this Court should decline consideration of the question of denial of counsel at trial.

B. PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL AT TRIAL.

Petitioner contends that he was denied the right to counsel at the trial court level. In order to discuss this contention properly it is necessary to review the circumstances concerning counsel. This contention was not raised in his petition for certiorari. Therefore, respondent did not designate for including in the appendix those portions of the record concerning petitioner's waiver of counsel. It is therefore necessary to refer to and quote extensive portions of the record dealing with the waiver of counsel in order to reply to this contention.

At the preliminary hearing the petitioner was represented by the public defender and was held to answer for trial (RT 32). Petitioner thereafter appeared in Superior Court on five separate occasions between June 7 and July 10, 1962, for arraignment and various motions and on each occasion was represented by the public defender (RT 2-12). On July 16, 1962, the day on which the case had been set for trial, the petitioner stated, "I would like to have this Honorable Court appoint counsel other than the public defender." (RT 15:6-7). The court immediately informed petitioner that he

had a right to appointed counsel but that this right did not include the right to choose whatever counsel he wanted. The court further stated that petitioner did not have to have the public defender if he did not want him but was not entitled to other counsel if the public defender was not disqualified for any reason. Petitioner replied:

> "THE DEFENDANT: One reason, your Honor, I asked for other counsel, and it is my desire and wish that I think I should be entitled to have other counsel, is, according to the records of the public defender's offices, they have lost an unduly large number of cases where the District Attorney's office has been involved." (RT 15:20-25).

The trial court informed petitioner that the public defender's office was very able and that their record was similar to private attorneys engaged in similar work:

> "THE DEFENDANT: Well, then, if that is the case, then I'm being denied on this particular motion, I think I will just go in court and try to represent myself to the best of my ability and without counsel.
>
> THE COURT: You don't wish to be represented by the Public Defender?
>
> THE DEFENDANT: That's right, and I would like the record to show that this is not an intelligent waiver of counsel as required by the Superme [sic] Court ruling.
>
> MR. PULICH: Wait a minute. 'It is not an intelligent waiver of counsel'?
>
> THE DEFENDANT: That's right.
>
> THE COURT: Well, you are entitled to select your own counsel, and there is no reason to replace the Public Defender with private counsel." (RT 16:19-17:7).

After determining that the petitioner was not offering to obtain his own counsel but rather wanted the public defender replaced with court-appointed counsel, the trial court denied the motion.

Thereafter a discussion ensued between the trial court and the public defender concerning the propriety of the public defender assisting the petitioner. The court then granted the petitioner's motion "that the Public Defender be relieved as his counsel and the defendant stand in pro per, . . . With the notation that the Court has requested and directed the Public Defender to have a member of his office present to consult with and advise the defendant to the extent that the defendant wishes." (RT 19:15-23).

On July 17, petitioner entered motions for discovery regarding prosecution witnesses and also motions to obtain certain law books. Trial was continued until July 18 (RT 20-22). On July 18, trial was continued until July 23 (RT 23-24) and on that date was continued until July 25 (RT 25-26). On July 25 the trial judge transferred the case to Department 3 for trial. In that Department the petitioner again claimed that the public defender's office was not qualified (RT 32:26-33:6). The judge informed the petitioner that the public defender's office was both efficient and dedicated and enjoyed a good reputation. When the court asked whether he had sufficient funds to retain a private attorney, petitioner replied:

> "THE DEFENDANT: No, I doesn't. You see, I made this also a considerable issue over in the other court. You see, the ruling I got from the Supreme Court, a defendant is entitled to counsel and I think in some cases other than the Public Defender and there is a number of cases from the U. S. Supreme Court says someone can waive counsel and frequently I have noted that in the record, I did not make a waiver of counsel." (RT 35:7-13).

The trial judge then advised the petitioner that it would be in his best interests to be represented by the public defender and further advised him of the difficulties involved

in a defendant's presenting his own case (RT 35:14-39:23). When the judge asked him why he insisted on representing himself, petitioner replied:

> "THE DEFENDANT: Because the Supreme Court in Wage vs. Indiana and Closky vs. New York, and those cases mostly involved counsel and the Supreme Court expressly states I am entitled, just as the Supreme Court expressly provides a man is entitled to counsel." (RT 40:6-10).

When asked to choose between proceeding on his own behalf or being represented by the public defender, petitioner replied:

> "THE DEFENDANT: Well, I just prefer to try to plead my own cause to the best of my ability, whether it comes up to the standard or par required by law." (RT 41:4-6).

After an extended discussion of the matter of counsel with petitioner, the trial court concluded:

> "You impress me as being a person of intellect even though I appreciate the fact you have been in school only through the 6th grade, but evidently you have had contact with people, you speak well, you have acquired experience unquestionably in relation to court matters, to the point that if literally you insist on representing yourself I cannot prevent you nor shall I. But on the other hand, I urge you to consider it, urge you to accept the services of the Public Defender and a service to yourself. What is your last word on the subject?
>
> "THE DEFENDANT: Well, I still insist on defending myself. I would rather the case go that way than go on the services of counsel. This way, the case itself as it stands now, and when it gets before a higher court if I am convicted, which I don't deny, I don't believe, because of the higher percentage of the State's Attorney of Alameda have; of course, it is possible. In case I do get convicted, it will go on appeal.

THE COURT: You understand, of course, you would still have the right of appeal whether you are represented by an attorney or not?

THE DEFENDANT: I understand.

THE COURT: Your rights are accorded to you, you understand that?

THE DEFENDANT: I understand. It looks much better going up without counsel.

THE COURT: In what way does it look better to you?

THE DEFENDANT: Because I do say that within California law there is another way you could appoint counsel other than the Public Defender's office. I do believe that. I haven't run across it in the books, but I think there is a couple of books I still haven't seen on this particular point." (RT 46:18-47:22).

The petitioner then peremptorily disqualified the judge in Department 3 from presiding over the trial (RT 48:21-51:5).

On July 30 the case had been referred back to the original trial judge. When the trial judge advised petitioner that the public defender could be reappointed, petitioner replied that "I do have a right in having counsel other than the Public Defender . . ." (RT 53:15-16). After another extended colloquy with the judge concerning the public defender and private counsel, petitioner replied:

"THE DEFENDANT: Well, then, just like I said before, if the Court won't appoint nobody else other than the Public Defender, I just as soon go to trial without a Public Defender." (RT 54:11-13).

When the judge indicated that the public defender should remain in the courtroom and assist the petitioner as an advisor, petitioner stated:

"THE DEFENDANT: I would rather for him not to participate in the case at all." (RT 54:25-26).

The court directed that the public defender remain in the courtroom to listen and be familiar with the case and be available to the petitioner upon his request (RT 56).

Finally, petitioner's conduct at the trial was very adept, prompting the court to comment at its conclusion:

> "THE COURT: Mr. Banks, before sentencing you, I want to say that you did an excellent job in presenting your case.
>
> THE DEFENDANT: Thank you, your Honor.
>
> THE COURT: And I would say it was about as good as the average young attorney does on his first few cases.
>
> THE DEFENDANT: Thank you, your Honor." (RT 637: 21-26).

The court's duty, when it appeared that defendant was indigent, was to protect his constitutional right to assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335 (1963). In the instant case this was done upon the petitioner's appearance in municipal court and continued during his initial appearances in the trial court. However, the right to counsel having been observed, it may not be manipulated by the defendant to thwart the orderly process of the due administration of justice and used as a tactic to delay trials. *United States v. Llanes,* 374 F.2d 712 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967).

Petitioner saw fit to dismiss the public defender with full knowledge that he would have to undertake the defense himself. The trial judge was clear, explicit and firm in his explanation to the petitioner of all of the dangers inherent in self-representation.

Petitioner's objections to the public defender were unrealistic and without cause. Certainly the objection offered by petitioner, that is, the allegation that the public defender's office had lost many cases where the district attorney's

office had been involved, presented no adequate ground for the appointment of another attorney.

Petitioner apparently also claims for the first time in his brief that his alleged lack of confidence in the public defender was based upon the public defender's failure to vigorously press a motion for separate trials for each of the charged robberies (Petitioner's Brief, p. 101). Not only was this reason not even mentioned to the trial court but furthermore it is an entirely inadequate basis. California Penal Code section 954 provides that an indictment may charge two or more different offenses connected together in their commission or two or more different offenses of the same class of offenses under separate counts. The three charged robberies were not only offenses of the same class but also were connected together in their commission having all been committed in the same geographical area within a period of one hour.

The trial judge's directive to either accept the public defender or proceed alone was entirely proper under all the circumstances confronting the court and the petitioner. A defendant who dismisses counsel without good cause is not entitled to the appointment of new counsel. *United States v. Llanes,* 374 F.2d 712 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967); *United States v. Burkeen,* 355 F.2d 241 (6th Cir.), *cert. denied, sub nom., Matlock v. United States,* 384 U.S. 957 (1966); *United States v. Abbamonte,* 348 F.2d 700 (2d Cir. 1965). Banks has failed to prove that his objections to the public defender were valid. His decision to dismiss counsel and proceed alone, therefore, constituted a knowing and voluntary waiver of his right to legal representation. *Johnson v. United States,* 318 F.2d 855 (8th Cir. 1963).

Throughout the extensive discussions in this case the trial court repeatedly urged petitioner not to defend in propria persona but rather to accept the court's offer to

appoint the public defender (see RT 35, 37, 38, 40, 45, 53). The reasons tendered by the petitioner in the record were not only patently frivolous but also highly indicative of his real purpose in refusing the court's offer of counsel.

During the colloquy with the trial judge, following his statement that he would represent himself without counsel, petitioner stated for the record that "this is not an intelligent waiver of counsel as required by the Supreme Court ruling." (RT 16). And at a later point, after further urging by the court to accept the public defender, petitioner stated that if he was convicted he would appeal and, "it looks much better going up without counsel." (RT 47). We submit that the plain inference to be drawn from this record is that, in light of his tenuous defense, petitioner was laying a foundation before the case was even tried for a contention on appeal. Petitioner believed that his chances of reversal on appeal would be greatly enhanced if he represented himself. The right to counsel may not be used to play "a cat and mouse game with the court." *Leino v. United States,* 338 F.2d 154, 156 (10th Cir. 1964).

The actions of the petitioner and the argument he advances in his brief make reference to *United States v. Plattner,* 330 F.2d 271, 276 (2d Cir. 1964), appropriate. It was there pointed out:

> "Moreover, one of the by-products of the recent developments in the law relative to the assignment of counsel in all but a few of the cases of indigent defendants has been an awareness by the prison population and a very considerable number of persons who may in the course of time add to the prison population, of the possibility of manipulating the basic rule in a fashion such as to produce a record of confusion on the subject, and to give the accused the opportunity to to claim a reversal in the event of conviction on the

> ground that his rights under the Fifth and Sixth Amendments had been infringed. The ingenuity of these individuals, especially the recidivists, betokens a high if misdirected intelligence." *Id.* at 276.

This Court should not condone the petitioner's deliberate tactic to confuse and manipulate the record concerning a defendant's right to counsel.

It should further be observed that Banks had the right to represent himself and to insist upon the discharge of his court appointed counsel. *United States v. Johnson,* 333 F.2d 1004 (6th Cir. 1964). The Constitution does not "require that under all circumstances counsel be forced upon a defendant." *Carter v. Illinois,* 329 U.S. 173, 174-175 (1946); *Adams v. U.S. ex rel. McCann,* 317 U.S. 269, 275 (1942). As recently stated in *United States v. Denno,* 348 F.2d 12 (2d Cir. 1965):

> "[E]ven in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with eyes open.'" *Id.* at 15.

The record in this case establishes that the trial judge was careful and thorough in explaining to Banks his right to counsel, and that Banks on his own volition made the deliberate choice to conduct his own defense.

Furthermore, although an accused person has the right either to appear in propria persona or to be represented by counsel, he has no right to a hybrid of the two rights. *Duke v. United States,* 255 F.2d 721 (9th Cir.), *cert. denied,* 357 U.S. 920 (1958); *Shelton v. United States,* 205 F.2d 806, 812 (5th Cir.), *cert. dismissed,* 346 U.S. 892 (1953), *motion denied,* 349 U.S. 943 (1955). Thus petitioner, having elected

to conduct his own defense, continued to have the assistance of counsel in an advisory capacity. Certainly, it cannot be said that under such circumstances petitioner was denied his right to counsel at trial.

C. PETITIONER WAS NOT DENIED COUNSEL ON APPEAL.

Petitioner contends that he was denied counsel on appeal when the Court of Appeal refused to appoint counsel at the time of the remands from this Court. This contention is premised on a series of misconceptions of the record.

The Court of Appeal did not refuse to appoint counsel on appeal in this case. Shortly after the record on appeal had been prepared the Court of Appeal appointed Robert M. Chefsky as counsel on appeal (A 315). Counsel thereafter filed a brief on behalf of appellant Banks and personally argued the case on behalf of Banks. The Court of Appeal affirmed the judgment of conviction (A 317-322).

After this Court remanded the case for further proceedings in light of *Griffin v. California,* 380 U.S. 609 (1965), the Court of Appeal sent a letter to both petitioner and his counsel advising petitioner that he was still represented by Mr. Chefsky on this appeal and that no different attorney would be appointed. After stating that the court would consider the impact of *Griffin* in deciding the matter the court informed petitioner and counsel that they could submit additional written arguments if they wished (A 328-329). Petitioner later filed a supplemental brief pro se. The Court of Appeal affirmed the judgment of conviction.

After this Court remanded this case for further proceedings in light of *Chapman v. California,* 386 U.S. 18 (1967), the Court of Appeal again sent a letter to petitioner and his counsel and informed counsel if he wished to file a supplemental brief he could do so (A 337). Petitioner later filed a supplemental brief pro se.

Thus the record reveals that the Court of Appeal did not refuse to appoint counsel on appeal. On the contrary the record shows that the Court of Appeal appointed counsel and counsel filed a brief and made an appearance to orally argue the case. In effect the petitioner is contending that the Court of Appeal refused to appoint a second or different counsel. A defendant for whom counsel has been appointed must accept such counsel absent a substantial reason for a substitution. *United States v. Llanes,* 374 F.2d 712 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967); *United States v. Burkeen,* 355 F.2d 241 (6th Cir.), *cert. denied sub nom., Matlock v. United States,* 384 U.S. 957 (1966).

In the instant case the petitioner offered the court only one reason as to why he was entitled to the appointment of a second counsel on appeal. That reason as stated in his letter to the court was because his appointed counsel on appeal failed to point out the *Griffin* constitutional error (A 327-328). In refusing to appoint a second counsel on appeal the Court of Appeal observed:

> "The case of Griffin v. California changed the law in the State of California and the Griffin case was decided after your judgment of conviction had been affirmed by this court. Mr. Chefsky could not have anticipated the Supreme Court's decision in Griffin v. California." (A 329:3-7).

This Court's later decision in *Tehan v. Shott,* 382 U.S. 406 (1966), was based on the premise that prior to *Griffin* the practice of commenting on the defendant's silence was well established. Petitioner may demand prescient counsel on appeal, the constitution does not. Thus, petitioner offered the court no substantial reason for the appointment of a second counsel on appeal. In the absence of such reason it is submitted that petitioner was not entitled to the appointment of a different counsel on appeal.

Petitioner now attempts to claim that Mr. Chefsky did not continue as his counsel on appeal during the remands. Petitioner bases this claim on a letter written by counsel to Banks shortly after the initial affirmance of this case by the Court of Appeal. However, it should be observed that this letter is not a part of the record before this Court. The letter is not in the files of the Court of Appeal nor was it transmitted to this Court by the Court of Appeal. Indeed, this letter, without authentication or verification, was presented to this Court as an exhibit attached to a supplement to the petition for writ of certiorari filed by the petitioner. Petitioner plainly is not entitled to cite and rely upon evidence which is not part of the certified record before this Court. *Lawn v. United States,* 355 U.S. 339 (1958); *McClellan v. Carland,* 217 U.S. 268 (1910). To the extent that petitioner's argument is based on alleged facts not in the record they are not before the Court. *United States v. Beard,* 381 F.2d 329 (6th Cir. 1967).

It should be observed that if petitioner did receive such a letter petitioner should have so advised the Court of Appeal. However, the petitioner chose not to do so. In view of his ingenious tactics to manipulate and confuse the record with regard to his right to counsel at trial petitioner may well have determined not to advise the Court of Appeal because it would "look much better going up" on certiorari.

Petitioner relies upon this Court's decisions in *Douglas v. California,* 372 U.S. 353 (1963), and *Anders v. California,* 386 U.S. 738 (1967), in support of his contention that he was refused counsel on appeal. Neither decision is applicable to the instant case.

In *Douglas* this Court held that an indigent defendant is entitled to the appointment of counsel on appeal. In the instant case petitioner was afforded counsel on appeal.

In *Anders* this Court held that appointed counsel's bare-no-merit conclusionary letter did not comply with due process because such procedure failed to furnish an indigent defendant with counsel acting in the role of an advocate. In the instant case appointed counsel filed a brief and orally argued the case.

Petitioner's contention is, therefore, under the circumstances of this case, not a claim of denial of counsel on appeal but rather a contention that appointed counsel should have filed a supplemental brief regarding application of the *Chapman* case and that his failure to do so violated due process. There are many opinions rendered by this and other Courts which substantially alter the constitutional rights of a defendant in a criminal trial. Such opinions affect literally hundreds or thousands of cases pending on appeal throughout this nation. Yet it has never been contended that due process requires that appellate counsel, whether appointed or retained, must file a supplemental brief in each case so affected. It is submitted that appointed counsel's failure to file a supplemental brief in the instant case did not violate due process.

CONCLUSION

For the reason that this Court is without jurisdiction, respondent respectfully urges that the writ of certiorari be dismissed. In the alternative for the reasons previously set forth, respondent respectfully urges that the decision of the Court of Appeal be affirmed.

Dated: San Francisco, California
April 8, 1969

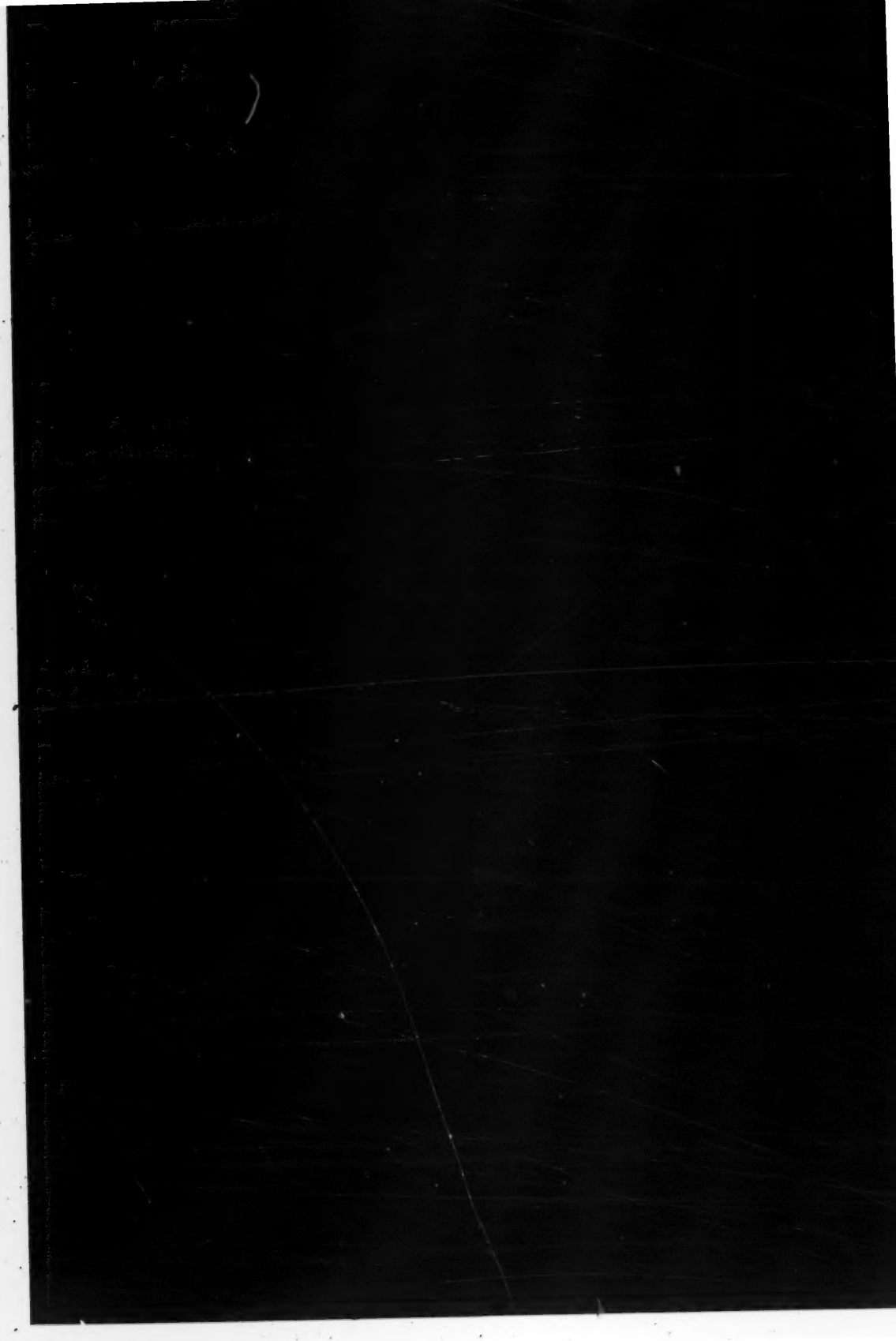
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Appendix

United States Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code

Title 28

28 U.S.C. § 1257 (1964), 62 Stat. 929 (1948)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution,

treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

California Constitution

Article VI, § 12

Sec. 12. The Supreme Court may, before decision becomes final, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction.

California Penal Code

§ 213. Punishment.

Robbery is punishable by imprisonment in the state prison as follows:

1. Robbery in the first degree for not less than five years.

2. Robbery in the second degree, for not less than one year. (Enacted 1872. As amended Stats. 1923, c. 128, p. 271, § 1.)

§ 664. Attempts; punishment.

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts as follows:

1. Offense punishable by five years or more. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half

the longest term of imprisonment prescribed upon a conviction of the offense so attempted; provided, however, that if the crime attempted is one in which there is no maximum sentence set by law or in which the maximum sentence is life imprisonment or death the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of not more than 20 years.

2. Offense punishable by less than five years. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

3. Offense punishable by fine. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. Offense punishable by imprisonment and fine. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction of the offense so attempted. (Enacted 1872. As amended Stats. 1923, c. 295, p. 625, § 1; Stats. 1931, c. 481, p. 1050, § 1; Stats. 1953, c. 713, p. 1983, § 1.)

§ 954. Charge of multiple offenses or different statements of same offense; consolidation of accusatory pleadings; election not required; conviction on multiple charges; statement in verdict or finding; separate trials; acquittal on some counts.

An accusatory pleading may charge two or more different offenses connected together in their commission, or

different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading; but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count. (Enacted 1872. As amended Code Am. 1873-74, c. 614, p. 437, § 44; Code Am. 1880, c. 47, p. 13, § 18; Stats. 1905, c. 574, p. 772, § 1; Stats. 1915, c. 452, p. 744, § 1; Stats. 1927, c. 611, p. 1042, § 1; Stats. 1951, c. 1674, p. 3836, § 45.)

California Rules of Court

Rule 28. Hearing in Supreme Court.

(a) [Time within which court may grant hearing.] Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b), may order the cause transferred to itself for hearing and decision, and within the original 30-day period the Supreme Court may for good cause extend the time not to exceed an additional 30 days. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 1, 1961; Jan. 2, 1962.

(b) [Time for filing petition.] A party seeking a hearing must serve and file a petition therefor within 10 days

after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court. As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan. 2, 1962.

(c) [Time for filing answer.] An answer may be served and filed within 20 days after the decision becomes final as to the Court of Appeal. As amended, effective Jan. 1, 1957; Jan. 1, 1959.

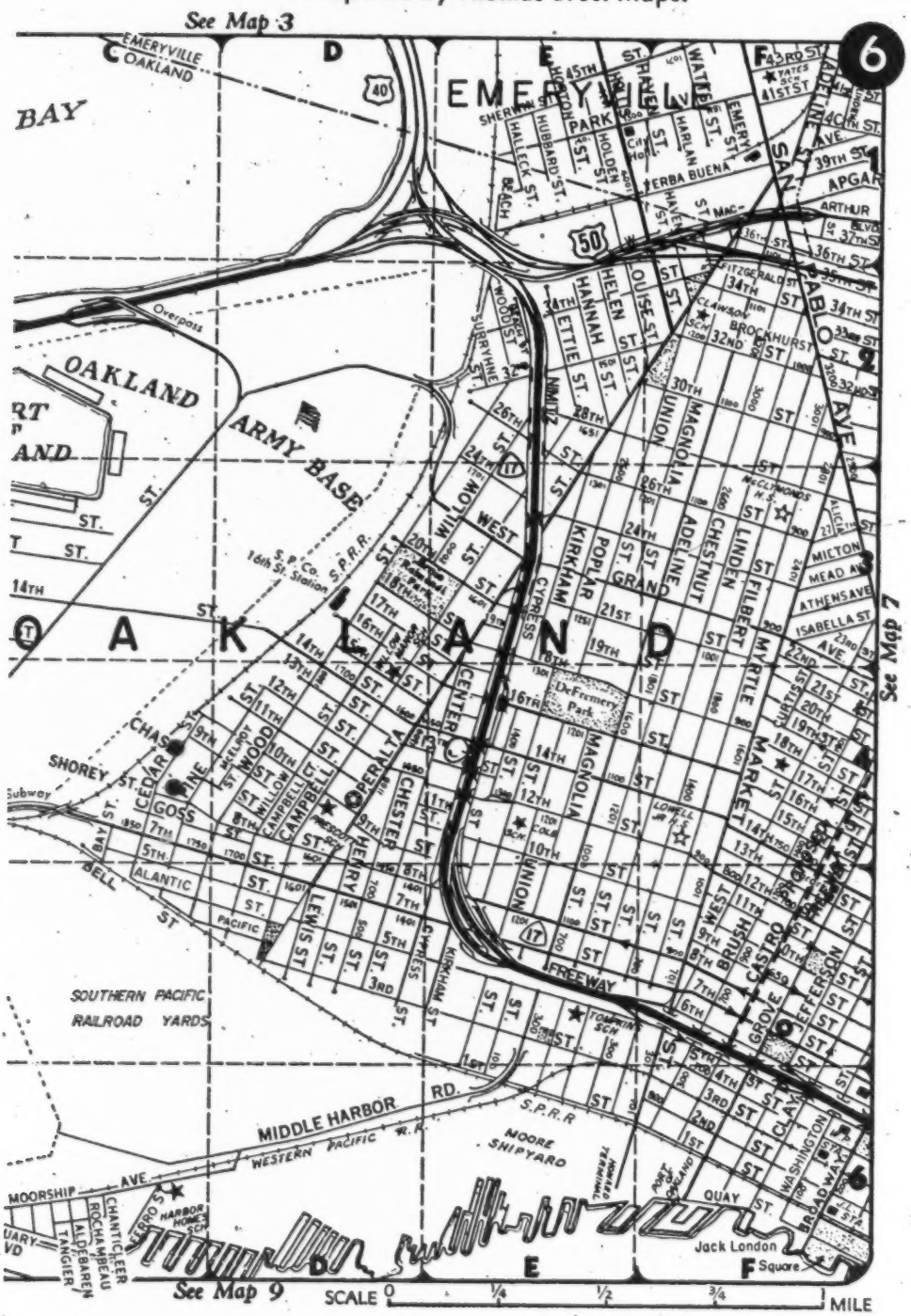
(d) [Form of petition and answer.] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15, and each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing the date of its filing.

(e) [Determination of petition.] A hearing in the Supreme Court, after decision in the Court of Appeal, may be granted by an order, signed by at least four judges assenting thereto, and filed with the clerk. The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time specified in subdivision (a) of this rule, the peti-

tion for hearing shall be deemed denied and the clerk shall enter a notation in the register to that effect.

(f) [Oral argument.] When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived.

"Alameda County Popular Street Atlas" (1961)
Prepared by Thomas Bros. Maps.



REME COURT. U. S.

FILED
APR 19 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 670

FRED BANKS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. EXISTENCE OF JURISDICTION.

As respondent's brief shows, petitioner sought a hearing in the California Supreme Court before he ever came here. Such review was discretionary (*People* v. *Davis* (1950), 147 Cal. 346, 348-349). A hearing was denied. This made the judgment of the Court of Appeal that of the highest state court in which judgment could be had (*Terry* v. *Southern Pacific Co.* (1917), 176 Cal. 584, 584-585; *Amer. Ry. Exp. Co.* v. *Levee* (1923), 263 U.S. 19, 20-21). It also

made the judgment final (*National Bank* v. *Los Angeles etc. Co.* (1906), 2 Cal.App. 659, 663-664; *People* v. *Ruef* (1910), 14 Cal.App. 576, 625, overruled in limited part, not here relevant, *Cothran* v. *San Jose Water Works* (1962), 58 Cal.2d 608, 610-612).

Respondent now contends that petitioner should have gone back to the State Supreme Court, to ask for discretionary review, after each remand. This was unnecessary. He had no right to further review (see *Nash* v. *Florida Industrial Comm'n* (1967), 389 U.S. 235, 237, fn. 1; *Teamsters Local* v. *Lucas Flour Co.* (1962), 369 U.S. 95, 98-101; cf. *Betts* v. *Brady* (1942), 316 U.S. 455, 460-461). It was doubtful the State Supreme Court could have granted review, even had it wanted to (*National Bank* v. *Los Angeles etc. Co.* (1906), 2 Cal.App. 659, 663-664; see also *Stetson* v. *Sheehan* (1921), 186 Cal. 334, 335). Further, what petitioner was seeking after each remand was enforcement of the Court's mandate. For that it was reasonable, and logical, that he come back here, to the Court that issued the mandate (*B. & O. R. Co.* v. *United States* (1929), 279 U.S. 781, 784-785; *In Re Sanford Fork & Tool Co.* (1895), 160 U.S. 247, 255-256). Indeed, his right to do so goes to the very heart of this Court's jurisdiction (*Williams* v. *Bruffy* (1880), 102 U.S. 248, 255-256; *Tyler* v. *Magwire* (1872), 84 U.S. 253, 282-283; see also *Sibbald* v. *United States* (1838), 37 U.S. 487, 491; *United States* v. *du Pont & Co.* (1961), 366 U.S. 316, 325; *Cascade Nat. Gas* v. *El Paso Nat. Gas* (1967), 386 U.S. 129, 136).

The cases cited by respondent do not compel a contrary result. In none of them had petitioner already sought, and exhausted, his option for higher state court discretionary review. And in one, he still had an absolute right to fur-

ther appellate review (*Gorman* v. *Washington Univ.* (1942), 316 U.S. 98, distinguished in *Teamsters Local* v. *Lucas Flour Co.* (1962), 369 U.S. 95, 98-99). None, of course, involved a remand, after a writ of certiorari had already been granted.

Finally, no suggestion was advanced by respondent in the court below that its decision on the first remand, back for review on the second remand, was not that of the highest state court in which a judgment could have been had, or that this Court had lacked jurisdiction to grant certiorari and remand (A. 339). Nor, for that matter, was respondent of the belief the argument had merit here, in view of its failure, or unwillingness, even to suggest the question in its briefs in opposition to the last two petitions for certiorari, or in its more recent motion to dispense with printing the record, filed just last December.

Had there been an obstacle to this Court's jurisdiction, because of a procedural trap in state law, then the right to counsel on remand would have become even more critical. And the issue now would be whether the Sixth Amendment also requires appointment of counsel for state court discretionary review—a question specifically reserved in *Douglas* v. *California* (1963), 372 U.S. 353, 356-357).

B. No Waiver of Fifth Amendment Rights.

No suggestion was ever made by the prosecutor or the trial judge that petitioner had waived his Fifth Amendment rights, through inept questioning or otherwise. Throughout the trial, they treated those rights in full

force and effect, and used them against petitioner, by comment and instruction to the jury on his failure to testify (A. 271, 299, 300, 308-309).

The submission of a handwritten instruction did not give rise to a waiver (Respondent's Brief, p. 34). The court had already told petitioner that it was going to give the instruction, if he did not testify (A. 7). Moreover, the instruction submitted was not the one given by the court, but was covered in another, more damaging instruction taken from somewhere else, which implied that if petitioner had knowledge to deny or explain the evidence, he should have done so (A. 14, 308-309; see italicized portion of instruction, p. 56, Opening Brief).

The isolated comments by petitioner during argument were an expression more of frustration and awkwardness, rather than any deliberate, knowing attempt to testify. Had the fact been otherwise, it would have been incumbent upon the trial judge to warn petitioner that he was in danger of waiving his Fifth Amendment rights (cf. *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 464). But this was never done. Indeed, the prosecutor came right back on closing argument and hammered at petitioner's exercise of those rights, by twice telling the jury that petitioner had not testified (A. 299, 300), and that the jury could take such failure into consideration in reaching a verdict (A. 300-301). Further, this was but a continuation of his tactic on opening argument, where his last, or "clinching" point, was that the defendant had failed to testify (A. 271).

None of the cases cited by respondent support the proposition that there was any waiver of Fifth Amendment rights by petitioner. In fact, one of them shows there was

no waiver, much less any so-called "inducement" for the prosecutor to level his attack (*United States* v. *Curtiss* (2 Cir. 1964), 330 F.2d 278, 281).

Finally, the two decisions below show there was no waiver of Fifth Amendment rights; instead, they show those rights remained intact throughout the trial, and were plainly violated by the instruction and comment on the failure to testify (A. 332-333; 341-342).

C. Retroactivity of Prohibition Against "Adoptive Admissions."

In *Johnson* v. *New Jersey* (1966), 384 U.S. 719, the principal issue was retroactivity of the *Miranda* warnings. Nothing was said of the adoptive admissions to which reference was made in footnote 37 of *Miranda* (384 U.S. 436, 468). *Miranda* itself recognized that the proscription against use of "adoptive admissions" was implicit in this Court's past decisions, and referred specifically to *Griffin*. Moreover, even before *Miranda* was decided, it was held by the California Supreme Court that the rationale of *Griffin* forbade the use of adoptive admissions, in a case like this, as a violation of the accused's privilege against self incrimination (*People* v. *Cockrell* (1965), 63 Cal.2d 659, 669-670, certiorari denied (1967), 389 U.S. 1006). This was logical, because if the right to remain silent meant anything at all, it meant the right to remain silent during custody, as well as at trial.

What *Miranda* does is recognize the principle announced in *Griffin*, that an accused cannot be penalized for asserting Fifth Amendment rights. It is just, therefore, that the rules governing retroactivity of *Griffin*, rather than

Miranda, be applied. So applied, the use of petitioner's silence against him warrants reversal (*O'Connor* v. *Ohio* (1966), 385 U.S. 92). To the extent the state has persuaded the Ninth Circuit to apply a different retroactivity rule, in *Wilson* v. *Madigan* (9 Cir. 1968), 389 F.2d 97, that decision misconceives the impact of *Griffin.*

On the merits, of course, the state advances no argument that the error was harmless. Nor, in fact, can it. Here petitioner's silence was used as a bludgeon, to obtain a conviction. Repeatedly it was brought to the attention of the jury, and repeatedly petitioner paid the price for it.

D. Identification Procedures; Right to Counsel.

Respondent asserts that immediately after each robbery, the descriptions given by the victims were communicated to Officer Nielsen, who eventually made an arrest of petitioner (Respondent's Brief, p. 44). But there was no evidence of this. At trial, the prosecutor asked Officer Nielsen, in general terms, if there had been any reports on the radio; however, he specifically instructed Nielsen not to state what had been heard in the way of descriptions or otherwise (A. 241). Thus, there was no evidence before the jury as to what descriptions the officer received. Had he in fact received the same descriptions as were contained in the on-the-scene reports prepared by the investigating officers, those descriptions would not have fit petitioner. None of them referred to a robber with a mustache, or chin whiskers (see P.X. 9, 11 and 13 for identification, A. 37-38). Only one, at the second liquor store, referred to a robber with a scar (P.X. 11 for identification). Further, the clothing described in each of the reports was so widely varied, that just about anyone in possession of a hat, or wearing

a shirt, sport coat and pants, would have qualified (P.X. 9 for identification: "dk. trousers, yell. plaid shirt, dk. spt jacket"; P.X. 11 for identification: "brn hat, drk. grey sport coat, dk trousers"; P.X. 13 for identification: "spt coat, brn & grey check, hat?").

Respondent contends, in effect, that the police were doing petitioner a service in taking him back to Pauletich for prompt identification (Respondent's Brief, p. 45). This immediate confrontation was not necessary. Had the police been truly interested in determining whether petitioner were the robber, all it would have taken was a telephone call to Pittsburg to find out where petitioner got his money (A. 248). But this was never done (A. 248). Further, at his arrest, petitioner specifically told Officer Nielsen that he was not the robber and that he had earned his money (A. 232, 248). He also said he was working and, apparently, that other people owed him money, which he could collect, if he needed it (A. 231, 233, 248).

Respondent intimates, at one point, that the clothing which has been removed and destroyed by the district attorney, as well as the diagram, likewise destroyed, were not actually before the jury (Respondent's Brief, p. 35, n. 4). This is not so. The prosecutor showed the clothing, in whole or in part, to nearly all his identification witnesses, as a principal ingredient of his case in chief (A. 63-64, 110, 129, 179, 194); and at the end of the prosecutor's case, as one of his last acts, all of the clothing was offered and received in evidence (A. 250). Further, the diagram was likewise received in evidence (A. 249). It was before the jury from the outset of the trial (A. 43-53). Moreover, during argument, the prosecutor specifically referred to the diagram on two occasions to show distances between

the stores (A. 270), even though the court had earlier forbade use of the diagram for this purpose (A. 46, 249).

What respondent's brief shows, if anything, is that the identification evidence was far from conclusive. One of the principal arguments advanced by respondent here, as by the prosecutor in the trial court on closing argument, is that it would be unreasonable to expect all the witnesses to agree on the clothing or other characteristics of the robber (Respondent's Brief, pp. 38, 46, 52; A. 293-294). But this uncertainty is precisely why the comment and instruction on the failure to testify were so harmful. Further, the very uncertainty shows why it was so important that the show-up and the line-up be free of undue suggestion, and it also demonstrates why the showing of photographs to the three witnesses who were least certain of an identification at the line-up, Jow, Griffith and Jones, was so highly prejudicial.

On the right to counsel issue, little need be said of respondent's assertions that petitioner was deliberately and knowingly "manipulating" the record for use on appeal (Respondent's Brief, p. 64). Had he been doing so, it is unlikely that he would have expressed himself, as he did, before the trial judge, or that he would have continually pressed his demands for counsel, after they had been first denied. Further, no request was ever made by petitioner for outside counsel until after the public defender had made two half-hearted attempts at arguing the motion for separate trials, and then deprecated petitioner when he attempted to raise the point himself (Tr. 7, 11-12, 14).

The issue of separate trials was not frivolous; it took five paragraphs of the Court of Appeal's original opinion

to dispose of the question (A. 317-318). Further, under California law, the trial judge plainly had the right to order the separate trials, "in the interests of justice and for good cause shown" (Pen. Code § 954).

It was only after petitioner saw what happened to this motion, and after the public defender had called him a "wise guy" in front of the judge (Tr. 18), that he became adamant in his refusal to be further represented by the public defender. In this he was not unreasonable. In fact, he was only asking for the minimum guaranteed by the Sixth Amendment:

> "Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer * * * " (opinion announcing the judgment of the Court, *Von Moltke* v. *Gillies* (1948), 332 U.S. 708, 725-726).

Little need be said of respondent's intimation that petitioner was likewise trying to "manipulate" the record on appeal when he made a request for counsel to brief and argue his case on each of the two remands (Respondent's Brief, p. 67). The court's own records showed that the original counsel had already been paid for his services (A. 324). Further, the court was now demanding prompt action from petitioner, and it knew that original counsel had taken over a year and a quarter to file a brief the first time (A. 316, 329). Had anyone shown the slightest interest in petitioner's request, or had a telephone call

been made to original counsel, it would have been discovered that counsel had withdrawn from the case. Certainly petitioner did everything he could to bring the matter to the attention of the court, and whatever may have been the merits of his request on the first remand, there was no excuse for not appointing counsel on the second remand. By that time, it was apparent petitioner had no one to speak for him.

As to respondent's contention that the letter by counsel, withdrawing from the case, may not be considered by the Court (Respondent's Brief, p. 67), suffice to say that such letter was plainly a part of the last petition for certiorari. It was here when the writ was issued; for that reason it is printed in the appendix (A. 323). The letter, of course, completely refutes the claim by respondent that petitioner still had counsel (A. 323).

E. All Issues Properly Before the Court.

Respondent attacks the precision with which petitioner, an indigent, has presented the issues in his various petitions for certiorari. Respondent contends that petitioner should have done a better job, and that this Court should therefore disregard the plain error shown in the record, as well as the issues raised by petitioner in the areas of his petitions outside the questions presented. This contention by respondent is plainly frivolous. The issues are in the record; they appear in the petitions. Respondent had no difficulty in identifying such issues as right to counsel, in filing its prior briefs in opposition to certiorari (Brief, No. 1210 Misc., O.T., 1964, pp. 2, 3-4, 5-8; Brief, No. 1358 Misc., O.T., 1967, pp. 5-6, 9-10). Also, the use of the line-up, the show-up, and the photographs

to obtain an identification were in the case from the beginning, and were always a part of petitioner's due process claims, to anyone who would look at the record. It would have been easier for petitioner, of course, if counsel had been appointed for him on either of the two remands. But he did the best he could. His petitions, though inarticulate, raised the issues, and the adoptive admissions, the line-up and the rest, are now properly here for decision (cf. *Pollard* v. *United States* (1957), 352 U.S. 354, 358-359; *Price* v. *Johnston* (1948), 334 U.S. 266, 292).*

Respectfully submitted,

THOMAS J. KLITGAARD
Attorney for Petitioner

April 15, 1969

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* See, e.g., Petition, No. 1210, O.T., 1964 (counsel at trial, p. 7; comment on failure to testify, p. 13; adoptive admissions, p. 20 (implicit); general denial of due process throughout proceedings, pp. 6-1/4, 10); Petition, No. 889 Misc., O.T. 1966 (comment, harmless error, pp. 3-4; counsel on appeal, pp. 6-7); Petition, No. 1358 Misc., O.T., 1967 (comment, harmless error, pp. 3-4; counsel on appeal, p. 4; adoptive admissions, due process issues incorporated, p. 8); Supplement to Petition, No. 1358 Misc., O.T., 1967 (adoptive admissions, p. 6; comment on failure to testify, pp. 5, 6; general denial of due process throughout proceedings, pp. 6-7; manner in which evidence admitted, p. 10; improper methods used to obtain a conviction, p. 10); Reply, No. 1358 Misc., O.T., 1967 (counsel on remand, pp. 3-4; comment, harmless error, pp. 4-5); Supplement to Reply, No. 1358 Misc., O.T., 1967 (comment, harmless error, pp. 2-3).

BANKS *v.* CALIFORNIA.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 670. Argued April 23, 1969.—Decided June 16, 1969.

Certiorari dismissed.

Thomas J. Klitgaard, by appointment of the Court, 393 U. S. 931, argued the cause and filed briefs for petitioner.

Edward P. O'Brien, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch,* Attorney General, *Albert W. Harris, Jr.,* Assistant Attorney General, and *Louise H. Renne,* Deputy Attorney General.

PER CURIAM.

Petitioner did not ask the Supreme Court of California to review the judgment entered by the Court of Appeal in this case. Therefore, the decision of the Court of Appeal is not a "[f]inal judgment . . . rendered by the highest court of a State in which a decision could be had . . . ." 28 U. S. C. § 1257, and we lack jurisdiction to review it. The writ of certiorari is dismissed for want of jurisdiction.

It is so ordered.